88-1447

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L. O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, and JAMES HASENBECK,
Petitioners,

v.

THE LOUISIANA LAND and EXPLORATION COMPANY as successor by merger and acquisition to INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (composed of JAMES B. TOWNSEND, BOB HOPKINS, and BOB ANTHONY), ROBERT H. HENRY as Attorney General for the State of Oklahoma, ROD W. YLITALO, MCFARLANE COMPANY, and TRIMBLE PROPERTIES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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QUESTIONS PRESENTED

I. Did the Oklahoma Supreme Court unlawfully take Petitioners' property, or deprive them of their property, contrary to the Fifth and Fourteenth Amendments of the United States Constitution, when that court rendered Petitioners' mineral leaseholds totally worthless by rewriting an earlier-issued final order, even though the order when issued recognized and validated Petitioners' leasehold interests and even though Petitioners relied on the clear intent and plain language of that order in making a multi-million-dollar investment decision?

II. Were Petitioners deprived of their right to procedural due process when the Oklahoma Supreme Court declared post-hoc that Petitioners' election not to participate under a "forced pooling order" extinguished Petitioners' mineral leasehold interests, even though the State had notified Petitioners before their election that the opt-out election would *not* extinguish Petitioners' leasehold rights?

LIST OF PARTIES

All Petitioners and Respondents are named in the caption. All parties before the Oklahoma Supreme Court are before this Court.

RULE 28.1 STATEMENT

As required by Rule 28.1 of this Court, corporate Petitioners list the following parent companies, subsidiaries, or affiliates:

A. Petitioner Ward Petroleum Corporation has no parent corporation and has no corporate subsidiaries that are not wholly-owned. Ward Petroleum Corporation does have two corporate affiliates: Ward Drilling Company, Inc. and Rambler Well Service, Inc.

B. Petitioner Nova Energy Corporation is a wholly-owned subsidiary of The Maple Corporation. Nova Energy Corporation has no subsidiaries. Nova Energy Corporation has the following corporate affiliates:

1. The Birch Corporation, a wholly-owned subsidiary of The Maple Corporation;

2. Maple Gulf Coast Properties Corporation and Arapaho Operating Company, subsidiaries of The Birch Corporation; and

3. Collet Oil Venture, Inc., Utah Reserves, Inc., and Mesa Pipeline Company, subsidiaries of Maple Gulf Coast Properties.

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WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L. O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, and JAMES HASENBECK,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

Ward Petroleum Corporation ("Ward"), Nova Energy Corporation ("Nova"), and the other petitioners ("Petitioners") ask this Court for a writ of certiorari to review the July 6, 1988 decision of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The Oklahoma Supreme Court's opinion below is unofficially reported at 59 Okla. B.J. 1878 (July 6, 1988), and will be officially reported as *Inexco Oil Co. v. Oklahoma Corporation Commission,* ____ P.2d ____ (Okla. 1988). A-16.[1] In that opinion, the Oklahoma Supreme Court reversed a "forced pooling order" (Order No. 277146, A-21) of the Oklahoma Corporation Commission. Part of the reversed order construed the scope of an earlier "forced pooling order" issued by the Oklahoma Corporation Commission (Order No. 260474, A-37).

JURISDICTION

The Oklahoma Supreme Court filed its opinion on July 6, 1988. A-16. Petitioners timely sought rehearing, which the Oklahoma Supreme Court denied on November 29, 1988. A-48. Jurisdiction lies under 28 U.S.C. § 1257(a) for this Court to review the final decision of the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This case involves the following constitutional provisions, statutes, and regulations, which are fully reprinted in the Appendix: U.S. Const. amend. V; U.S. Const. amend. XIV; Okla. Stat. tit. 52, § 87.1 (Supp. 1988); Oklahoma Corporation Commission Policy Statement No. 45 (May 3, 1984).

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[1]The Appendix to this Petition is cited as "A-__."

STATEMENT OF THE CASE

I. Geology and legal terrain of oil and gas

Oklahoma has rich deposits of oil and gas. These minerals lie under land owned by many persons. To exploit the oil and gas, a mineral fee owner typically enters into an "oil & gas lease" with developers like Petitioners Ward and Nova or like Respondent Inexco Oil Co. ("Inexco"). This lease conveys an interest in the land, namely, the right to exploit sub-surface oil and gas.[2] An oil & gas leasehold, then, entitles a purchaser like Ward, Nova, or Inexco to recover minerals from the land by drilling and operating one or more wells on that land.

The subterranian boundaries of oil and gas deposits do not coincide with the artificial (legal) boundaries of surface land estates. Also, oil and gas migrate under the ground, so that a well drilled under one leasehold may siphon oil and gas from a neighboring leasehold. Absent state regulation, these physical properties encourage leasehold owners to drill as many wells as they can, as fast as possible, and to pump those wells at full throttle, all so that oil and gas will not be drained from their leaseholds by a neighbor. These wasteful practices do not efficiently drain the oil and gas from underground pools, leaving undrained pockets. These pockets are irretrievably lost.

To avoid these chaotic and wasteful activities, Oklahoma regulates oil and gas production by creating "drilling and spacing units" as tracts of up to 640 surface

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[2]Under Oklahoma law, an oil & gas lease is recorded as any other conveyance of land.

acres. These units aim at effectively draining the oil and gas while protecting each leasehold owner from unfair drainage. A unit may cover multiple parcels of land and may thus affect many oil & gas leasehold interests. Each leasehold owner is entitled to a proportionate share of all oil and gas under the unit.

Under Oklahoma law, the unit is developed one well at a time. If the first well ends up effectively draining the unit, no additional wells will be drilled. However, additional wells are permitted if necessary to get all the oil and gas from the ground. Because of various geological factors like porosity and permeability, a well located at point A in a unit may be able to drain part of the oil and gas, but may not be physically capable of reaching the rest. A second well must be drilled in a different location from which the rest of the oil and gas may be drained.

Under Oklahoma's system of drilling and spacing units, many oil & gas leaseholders will have rights to drain the minerals in a given unit, which is designed to be exploited as a unitary whole, one well at a time. The oil & gas leaseholders must thus cooperate or be forced to cooperate through state intervention. They may privately agree on how to proceed. Often, they fail to agree. But such failure does not foreclose drilling. Rather, one leaseholder applies to the state for a "forced pooling order." The application identifies the location of a proposed well within the unit, urges that the costs and revenues of the proposed well be shared proportionately by all those who will participate in the proposed well, and also identifies a candidate to act as operator of the proposed well.

In Oklahoma, an application for a forced pooling order is made to the Oklahoma Corporation Commission (the "Commission"). Other interested parties may respond. The proceeding is often contested. Sometimes, competing (cross) applications are filed. After receiving all evidence and comments, the Commission enters a forced pooling order. Under Oklahoma law, such entry has the same dignity as a trial court's judgment, and the forced pooling order may be appealed directly to the Oklahoma Supreme Court.

One aspect of a forced pooling order, the "opt-out" feature, is especially important. Each owner whose oil & gas leasehold interest is partly or wholly comprehended in the drilling and spacing unit may choose not to contribute to the drilling costs of the proposed well and concomitantly not to share in any resulting revenues. Typically, a forced pooling order provides some limited compensation for each opt-out elector. If the proposed well ultimately proves to be a prolific producer, the pay-back to one who has elected out will usually be far less than the corresponding share of future revenues.

A forced pooling order has another important aspect, which is key to this case. The unit's first well as proposed in the initial forced pooling order may not drain the oil and gas extractable from the whole unit. Accordingly, a second forced pooling order may be sought. That is, after the well drilled per the first pooling order proves unable to drain the whole unit, either the operator of that well or another leaseholder may apply for an order authorizing the drilling of a second well in the same unit. This second well is called an "increased density well."

The prospect of a second (or third, or fourth, or fifth) well raises a key question concerning the opt-out election made under the first pooling order. The question is simple: Does the opt-out election made under the first pooling order exclude the opt-out elector from only the first well in the unit (*i.e.*, does the first pooling order have only a single-well or "well-bore" scope), or does the opt-out election automatically exclude the elector from *all* future wells in the unit (*i.e.*, does the first pooling order have a more permanent or "unit-wide" scope)? If the first pooling order has only a well-bore scope, then any leaseholder who opted out under the first order may elect again *de novo* whether to opt in or out of any well drilled under later forced pooling orders. In effect, the opt-out elector retains all oil and gas rights under his own leasehold, except to the extent those rights are diminished by extraction of oil and gas through the first well. Oil and gas extractable through other wells in the unit remain the property of the opt-out elector.

The scope of a forced pooling order, well-bore versus unit-wide, has crucial importance to a leaseholder forced to opt in or opt out under a pooling order. This importance lies at the center of this case.

II. The two forced pooling orders in this case and petitioners' vested oil and gas interests

Each Petitioner owns a fractional oil & gas leasehold interest covering certain lands in Oklahoma. These interests have been taken by the State.

By Order No. 197226 of August 26, 1981, the Commission established the 640-acre drilling and spacing unit

covering Petitioners' oil & gas leaseholds. The Oklahoma lands associated with this unit are known as "Section 23, T12N, R14W, Custer County, Oklahoma." A-17. Geological studies suggested the presence of much oil and gas in this unit. Thus, the drilling of a first well was proposed. The owners of oil and gas interests discussed the optimal location of this well, but could not agree on a voluntary plan for drilling this first well.

Accordingly, Respondent Inexco applied to the Commission for a forced pooling order.[3] On June 6, 1984, the Commission issued the first forced pooling order in this case (Order No. 260474, A-37). This will be called the "First Order." It forced a pooling of each Petitioner's interest in the initial well proposed within the 640-acre land unit. *See* R. 178.[4] The First Order also designated Inexco as operator of the proposed well and established the estimated costs of drilling that single well. Under the First Order, each owner of an oil and gas interest in the unit was then given an election: (1) "stay in" and participate by sharing the costs of drilling and later sharing the revenues from the proposed well's production, or (2) opt out by surrendering to operator Inexco the owner's oil and gas interest in the proposed well.

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[3]Inexco asked for a forced pooling of all interests in the Red Fork member of the Des Moines common source of supply underlying the Section 23 unit. Drilling of a well involves not only horizontal spacing considerations on the land surface but also vertical depths. The "Red Fork" and "Des Moines" references pertain to considerations of oil and gas depths.

[4]References to the record before the Oklahoma Supreme Court are cited here as "R.__."

The First Order compelled operator Inexco to pay each opt-out elector a fixed value for the property interest being surrendered via the election not to participate in the proposed well. Paragraphs 2.c and 4 of the First Order, as entered by the Commission, set forth the election as follows:

> [paragraph 2.c] That an overriding or excess royalty of 1/8 of 8/8 is also a fair, reasonable, and equitable bonus to be tendered unto each owner who elects not to participate in *said well* by paying such owner's proportionate part of the costs thereof; such overriding or excess royalty is satisfaction in full for all rights and interests of *such owner in the well covered hereby,* except for any normal 1/8 royalty interest as defined in 52 O.S., Section 87.1(e) (1971).
>
> [paragraph 4] In the event any owner elects to do other than participate *in said well* by paying his pro rata share of the costs thereof, or fails to make any election provided above, *such owner shall be deemed to have relinquished unto Inexco Oil Company all of such owner's rights, title, interest, or claim in and to the well,* except for any normal 1/8 royalty interest, defined above, or other share in production to which such owner may be entitled by reason of an election hereunder.

A-40, 43 (emphasis added). Any owner whose oil and gas interest was pooled by force—including Respondent Inexco—could have appealed the First Order to the Oklahoma Supreme Court, but the First Order was never appealed. Under Oklahoma law, the Commission's First Order thus became final and acquired the force of a trial court's

judgment.

Petitioners and their predecessors had differed sharply with Respondent Inexco over the optimal drilling location for Inexco's proposed well. *See* R. 57. Inexco's geological interpretation pointed to one corner of the unit, while Petitioners and their predecessors viewed an entirely different corner of the unit as optimal. *See* R. 56. Inexco's view prevailed, which prompted Petitioners to elect out of Inexco's proposed well. *See* R. 52, 65.

Petitioners elected out believing that a second (optimal) well would be drilled. And Petitioners had notice that the First Order covered only the proposed first well, as told by the First Order itself and the well-bore-only *policy* adopted a month earlier by the Commission's Policy Statement No. 45. A-13. *See* pp. 14-15 *infra.*

After the First Order became final without appeal, Inexco drilled what became the "Wolfe Well." *See* R.42. Completion confirmed that Inexco's geological interpretation was wrong. The Wolfe Well proved to be only a marginal producer.

With Inexco's Wolfe Well incapable of recovering all the oil and gas in the unit, both Inexco and Ward sought authorization from the Commission to drill a second (increased density) well for draining the unit. As with the Wolfe Well, the oil and gas owners failed to agree upon a voluntary plan for developing the second well. In January and February 1985, Ward and Inexco filed cross-applications seeking a second forced pooling order. Each sought to be the operator of the second well, *see* R. 4, 17, which was proposed where Petitioners had predicted all

along.[5]

On April 25, 1985, the Commission issued a second forced pooling order (Order No. 277146, A-21), to cover the second well within the unit. This will be called the "Second Order." The Commission held that when Petitioners elected not to participate in Inexco's Wolfe Well under the First Order, they had surrendered their interests in only whatever oil and gas was extracted through the Wolfe Well. So Petitioners had fully retained their property interests in whatever oil and gas could be extracted through a second, third, or later well in the unit. With the Second Order, the Commission thus confirmed the limited well-bore scope of the First Order and rejected the idea that the First Order had somehow covered *all* future wells within the unit.

Having re-affirmed that the First Order covered ony the Wolfe Well, the Commission's Second Order also forced a pooling of the second proposed well and designated Petitioner Ward as the operator. Ward then drilled what became the "Albright Well" in the location predicted as optimal by the geological interpretation of Ward and the others who elected not to participate in Inexco's sub-par Wolfe Well. Completion proved the

[5]The Oklahoma Supreme Court's decision in this case mistakenly suggests that the dispute over optimal drilling location concerned the second (increased density) well. *See* A-18. In fact, the dispute concerned only the *first* proposed well. Once this well proved marginal, there was no dispute about where the increased density (second) well had to be drilled.

Albright Well as a prolific producer.[6]

III. Appeal of second forced pooling order to the Oklahoma Supreme Court and destruction of Petitioners' property interests

Respondent Inexco appealed the Second Order to the Oklahoma Supreme Court. While Inexco's appeal was pending, the Oklahoma Supreme Court decided *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203 (Okla. 1988). With this decision, the Oklahoma Supreme Court held that as a matter of state law, the Commission has authority to force a pooling only on a unit-wide basis, or not at all. In issuing this ruling, the Oklahoma Supreme Court expressly recognized that it was deciding an "issue of first impression," and that the new ruling had "not been clearly foreshadowed" by earlier decisions. *Id.* at 208.

Based on *Amoco,* Inexco sought a favorable summary disposition of its appeal from the Second Order. Petitioners opposed summary disposition by arguing, *inter alia,* that the Oklahoma Supreme Court could not simply rewrite the final and never-appealed First Order from a well-bore order to a unit-wide order without violating the due-process and takings clauses of the United States Constitution. A-49-55, 56-63, 74-75, 76-77, 92. Petitioners agreed that under *Amoco,* the still non-final *Second* Order could not be given well-bore scope. But the well-bore

[6]The Wolfe and Albright Wells cost roughly the same to drill, $2 million each. But the Wolfe Well yielded a piddling $43,000 in revenues, while the Albright Well has yielded $13 *million* and still flows strong. This vividly shows how the first well in a unit may reach only a tiny fraction of the oil and gas in the unit, while a second well may reach a volume of "mother lode" proportions.

scope of the *First* Order had to be left intact because it was final, it was never appealed, and it was meant and understood by all to have only a well-bore scope.

Alternatively, Petitioners argued that the Oklahoma Supreme Court should direct the Commission to vacate both the First *and* the Second Orders, so as to provide a new and fair election to Petitioners and everyone else, with notice this time that the election would be for the entire unit. The Oklahoma Supreme Court thus had two fully appropriate alternatives for affording constitutional fairness to all, with no material prejudice to anyone.[7] But instead, the Oklahoma Supreme Court either ignored the well-bore scope of the First Order or pretended it was a unit-wide order by rewriting the First Order contrary to its understood meaning.[8]

The Oklahoma Supreme Court issued its opinion in this case on July 6, 1988. As the court saw it, the question

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[7]The Oklahoma Supreme Court had a third alternative: give the new *Amoco* ruling full retroactive effect by holding that the Commission never had jurisdiction to enter any well-bore pooling order, so that *all* well-bore orders ever entered by the Commission were void *ab initio*. This would have brought chaos to Oklahoma's oil & gas industry. Thus, after adopting the new *Amoco* ruling for the State, the Oklahoma Supreme Court gave it prospective effect only, by holding that the new rule of unit-wide pooling would not apply to any forced pooling order which had become fully final (with or without appeal) as of the February 1988 date of mandate issuance in *Amoco*. *See* 751 P.2d at 208.

[8]And by rewriting the First Order despite its finality, the Oklahoma Supreme Court violated its own pronouncement that the new *Amoco* ruling would not be applied retroactively to final pooling orders like the First Order. *See* note 7 *supra*.

was whether the Commission had "made an error [of] law and exceeded its jurisdiction," specifically, "by repooling a previously pooled 640 acre drilling and spacing *unit.*" A-17 (emphasis added). The court held that the Commission had erred because under the new *Amoco* rule, the First Order *had* to be a unit-wide pooling order.[9] Since Petitioners or their predecessors had made an opt-out election under the First Order, the court summarily held that Petitioners had no right to participate in the second or any future wells within the unit. *See* A-18, A-19, A-20. The Oklahoma Supreme Court's opinion does not address at all Petitioners' claims under the due-process and takings clauses.

After the Oklahoma Supreme Court's opinion in this case, Petitioners sought rehearing and asserted that the court's action had now committed federal constitutional violations. A-64-70, 78-79, 85-87. Specifically, Petitioners argued that the Oklahoma Supreme Court's post-hoc rewriting of the First Order had produced an unconstitutional taking of their valuable oil & gas leaseholds and had violated procedural due process by depriving them of fair notice in making an election under the First Order. Petitioners reasserted these arguments in their reply briefs supporting rehearing, filed at the express request of the

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[9]The court said only this: "The [Commission] found Order No. 260474 [the First Order] force pooled the well-bore, not the unit. This clearly was erroneous. The [First Order] force pooled the entire unit, not just the well-bore. *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203, 206 (Okl. Ct. App. 1986) (Adopted by the Supreme Court Feb. 9, 1988)." A-18. Nowhere does the court's opinion even hint that the First Order was not *meant* or was not *understood* to have only a well-bore scope.

Oklahoma Supreme Court. A-71-73, 80-84, 88-91. On November 29, 1988, the Oklahoma Supreme denied rehearing without opinion. A-48.

IV. Petitioners' reservation of oil and gas interests in later wells and surrender of interests only in the first well

Both the initial hearing officer and the Commission en banc considered the scope of the First Order. And both concluded that the First Order meant to pool only the oil and gas interests in the Wolfe Well. *See* R. 143, A-21, A-96. Respondent Inexco will undoubtedly contest this. But the intended and understood well-bore scope of the First Order is simply not subject to reasonable dispute.

The First Order was issued by the Commission. Its own intention must determine the meaning of the First Order. The Commission itself made plain and clear its intention when the Commission issued the Second Order. Thus, by declaring that Petitioners *could* participate in the Albright Well, the Commission left no doubt that its First Order was meant to have only a well-bore scope.

The Commission's issuance of Policy Statement No. 45—just over one month before the Commission entered the First Order—reveals even more unmistakably the Commission's well-bore intent in issuing the First Order. Without limitation, Policy Statement No. 45 decrees:

> [I]t is important to the continuing vitality of the industry, especially with regard to increased drilling investment, to rely on this Commission's expertise and oversight capacity in adopting and

> stating categorically a uniform policy on which all elements of the industry can rely.
>
> The policy of this Commission is to pool, without exception, by the wellbore . . . .

A-13. The First Order was issued just weeks after the Commission stated "categorically" that it was adopting a "uniform policy" to pool by the well bore "without exception."

Even while challenging the propriety of the Commission's actions, Inexco itself has admitted:

> The language from Policy No. 45 quoted above also shows that the Commission intends to apply its so-called interpretation as a hard, fast rule in every forced pooling case *just as it did in the present case.* Therefore, it has taken Policy No. 45 beyond the status of an interpretation and implemented it as a de facto agency rule.

Reply Brief of Appellant Inexco Oil Company to Answer Briefs of Appellees, filed November 18, 1985, at 9 (emphasis added). Whether Policy Statement No. 45 is valid or not, the Commission and every party in this case has agreed that the intent and purpose of the First Order was to force a pooling of interests only in the oil and gas as might be extracted through the Wolfe Well.

Perhaps most clearly of all, the terms of the First Order demonstrate its well-bore scope. Each of several findings and ordering paragraphs in the First Order dictates this conclusion:

—finding paragraph (5) states that

"Inexco Oil Company proposes to develop such unit and the common sources of supply therefor by the drilling of *a well* . . ." A-39;

—ordering paragraph (1) states that

"Inexco Oil Company proposes to drill *a well* in Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma . . ." A-39;

—ordering paragraph (2) (b) states that

"$1250.00 per acre cash, plus an overriding or excess royalty of 1/16 of 8/8, is a fair, reasonable and equitable bonus to be paid unto each owner who elects not to participate in *said well* by paying such owner's proportionate part of the costs thereof; such cash bonus plus overriding excess royalty, when paid as set out in this [First Order], is satisfaction in full for all rights and interests of such owner in *the well* covered [by the First Order] . . . " A-40;

—ordering paragraph (6) states that Inexco

"is designated operator of *the well* . . . " A-44; and

—Ordering paragraph (7) states that Inexco

"must commence operations for the drilling or other operations with respect to *the well* covered [by the First Order] within 180 days from the date of this Order and diligently prosecute the same to completion in a reasonably prudent manner, or this Order shall be of no force and effect . . ." A-44.

This language demonstrates that, true to the Commission's unquestionable purpose and intent, the First Order focused only upon the Wolfe Well, meant to affect only whatever oil and gas might be extracted from that Well, and left intact Petitioners' property interests in any oil and gas that could be extracted in the future from later wells in the unit.

The Oklahoma Supreme Court's opinion cited only one passage from the First Order to support the summary and unexplained conclusion that the First Order somehow had a unit-wide scope:

> [Inexco] proposes to drill a *well* in [the Section 23 drilling and spacing unit in this case], and to *develop said unit . . . as a unit,* and the rights and equities of all oil and gas owners covered hereby are pooled, adjudicated, and determined.

A-39 (emphasis added). But taken as a whole and in context with the above-quoted references to a single well, even this passage cannot reasonably suggest a unit-wide scope. It merely says that Respondent Inexco proposed to *develop* the unit as a unit, but through a *pooling* of only one well at a time. And it is the Commission's own *forced pooling* which holds the key to this case—a *forced pooling* of only one well bore at a time.

When Respondent Inexco appealed the *Second* Order to the Oklahoma Supreme Court, the key question presented on appeal was the pooling scope of the *First* Order. Disregarding the Commission's own answer to this question, the Oklahoma Supreme Court held that the First Order had necessarily pooled the entire unit, not merely the Wolfe (first) Well. This ruling of the Oklahoma

Supreme Court rewrote the final and never-appealed First Order contrary to its unmistakable intent and has prompted this Petition for certiorari review.

Thus acting through its supreme court, the State of Oklahoma has taken Petitioners' property interests in the multi-million-dollar Albright Well without just compensation and after a misleading notice that an opt-out election under the First Order would mean surrender of interests only in the Wolfe Well. To this day, Petitioners have not even been afforded the election which the Oklahoma Supreme Court's own opinion concedes: an opportunity to elect with notice that the choice to stay in or out would be for the unit as a whole.

Petitioners therefore ask this Court for a writ of certiorari to review an unusual case of grievous due process violations and grave injustice. At the very least, Petitioners ask this Court to reverse and remand the case for consideration of federal constitutional principles which the Oklahoma Supreme Court disregarded when it destroyed Petitioners' property interests and also the rights vested via the final and never-appealed First Order of the Commission.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari in this case for one simple reason. The Oklahoma Supreme Court "has decided a federal question in a way in conflict with applicable decisions of this Court." S.Ct. Rule 17.1(c). In so deciding this case, the Oklahoma Supreme Court has deprived Petitioners of property interests worth millions

of dollars. This Court should grant certiorari to safeguard basic constitutional principles it has pronounced and to avoid the occurrence of a profound injustice.

Petitioners emphasize that their constitutional position rests on the final and never-appealed First Order, which unquestionably meant to have only a well-bore scope. Respondent Inexco will argue that the First Order was *not* intended to have a well-bore scope, but instead was intended to have a more permanent, or unit-wide, scope. For reasons already given, this argument simply ignores reality. *See* pp. 14-18 *supra.*

A recognition that the authoring Commission meant (and all parties understod) the First Order to have a well-bore scope shows that this Petition should not be discarded as "fact-specific." Actually, this case makes an excellent vehicle for issuing the important declaration that state courts may not blithely strip citizens of vested property rights simply by rewriting post-hoc otherwise final agency or judicial orders. The Oklahoma Supreme Court violated Petitioners' constitutional rights in just this fashion for each of the three reasons set forth below.

(I)

The Oklahoma Supreme Court's decision unlawfully took and deprived Petitioners of their property by rendering vested leasehold interests previously worth millions of dollars entirely without value.

At bottom, what happened here is simple. The Commission intended, and all affected parties understood, that the First Order would preclude opt-out electors like Peti-

tioners from sharing in only the oil and gas production from the Wolfe (first) Well. As a result, Petitioners' oil & gas leases—traditional property interests in physical minerals—remained otherwise undiminished by the First Order. Those leasehold interests cover millions of dollars worth of still-untapped oil and gas that could be extracted through other wells in the unit. But through its decision, the Oklahoma Supreme Court rendered those leasehold interests entirely without value to Petitioners. This action of the Oklahoma Supreme Court—effectively robbing Petitioners of multi-million dollar ownership interests in actual physical assets—unconstitutionally took Petitioners' property.

The reasons why are settled by this Court's prior decisions. "It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken . . . ." *Alamo Land & Cattle Co., Inc. v. Arizona,* 424 U.S. 295, 303 (1976).[10] Here, Petitioners' leasehold interests unquestionably were "taken" because the Oklahoma Supreme Court's action stripped Petitioners of "*all* use of their property." *First English Evangelical Lutheran Church v. Los Angeles,* 482 U.S. 304, 107 S. Ct. 2378, 2389 (1987) (emphasis added).

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[10]Leasehold interests are protected from uncompensated takings. *Accord, e.g., First English Evangelical Church,* 107 S. Ct. at 2389; *A. W. Duckett & Co. v. United States,* 266 U.S. 149 (1924). The Fifth Amendment's takings clause is incorporated into the Fourteenth Amendment. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckworth,* 449 U.S. 155, 160 (1980).

Accord, e.g., Agins v. Tiburon, 447 U.S. 255, 259 n.6 & 260 (1980) (taking occurs when state action "denies an owner economically viable use of his land"); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414 (1922) (state takes a "very valuable" estate in land by rendering it "commercially impracticable" for owner of coal rights to mine its coal).[11]

That the State of Oklahoma did not appropriate Petitioners' property for its own benefit makes no difference. "A taking is a taking regardless of whether the invasion of property is committed by the government or by a private party acting at the government's invitation." L. Tribe, American Constitutional Law § 9.6, at 604-05 n.33 (2d ed. 1987). Nor does it matter that Petitioners were compensated for that *limited portion* of their oil and gas interests they surrendered during the *limited period of time* that the Wolfe Well was exploited. The just compensation clause requires "a *full* and *perfect* equivalent for the property

[11]Indeed, because the Oklahoma Supreme Court effectively has transferred Petitioners' interests in real property to others, this case involves a "per se taking" by way of a "permanent physical occupation authorized by government." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426 (1982).

taken." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 326 (1893) (emphasis added).[12]

Finally, it matters not that the State's deprivation of Petitioners' property was effected by the Oklahoma Supreme Court, rather than the state legislature or a state agency. "The prohibition . . . forbids uncompensated takings by the judicial and executive branches as well as by the legislature." L. Tribe, American Constitutional Law § 9-2, at 589 n.7 (2d ed. 1987). *See generally Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 679-80 (1930).

The bottom line is clear: For reasons already given, the First Order meant to render opt-out electors ineligible to participate *only* in the oil and gas produced from the Wolfe Well. As a result, Petitioners retained substantial leasehold interests following the entry of the First Order, which recognized and left in place Petitioners' property rights to capitalize on the extraction of *their* oil and gas from all future wells in the unit. The Oklahoma Supreme Court's opinion—which effectively rewrote the First

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[12]Not surprisingly, other courts have applied this basic principle of "full compensation" in circumstances just like here—namely, where a state first effects a proper taking and later seeks to expand the scope of that taking without affording further compensation. *See, e.g., Barfnecht v. Town Board of Hollywood Township,* 232 N.W.2d 420, 425 (Minn. 1975) ("Thus, a dedication by public use cannot constitutionally exceed the amount of actual dedication."); *Lovvorn v. Salisbury,* 701 P.2d 142, 144 (Colo. Ct. App. 1985) (if width of highway "is to be expanded or the location changed, acquisition of additional land must be established by eminent domain or otherwise"); *Eager v. Mackie,* 136 N.W.2d 16, 18, 19 (Mich. 1965) (same). Certiorari should thus also be granted because Oklahoma's "court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort." S. Ct. Rule 17.1(b).

Order contrary to its plain intent—has destroyed Petitioners' valuable leasehold interests. Such a massive taking of Petitioners' oil and gas property is constitutionally impermissible under the decisions of this Court.[13]

(II)

Petitioners have been deprived of their right to procedural due process of law by being given a fundamentally misleading notice resulting in the unfair forfeiture of their property rights.

"Ingrained in our due process is the requirement of notice." *Lambert v. California,* 355 U.S. 225, 228 (1957). Thus, "[n]otice is essential before property interests are disturbed." *Id.* at 228. Moreover, "when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 315 (1950). The notice must be "reasonable" *e.g., id.,* at 312, and "meaningful," *e.g., Peralta v. Heights Medical Center, Inc.,* 108 S.Ct. 896, 899 (1988), and "fair," *Zauderer v. Office of Disciplinary Counsel of the Supreme Ct. of Ohio,* 471 U.S. 626, 671 (1985). In short: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be *fairly advised of what the*

[13]Argument (III) *infra* shows why the Oklahoma Supreme Court's decision also violates due process through a retroactive interference with Petitioners' vested rights.

Government proposes . . . ." *Morgan v. United States,* 304 U.S. 1, 18-19 (1938) (emphasis added).[14]

These principles show that the Oklahoma Supreme Court's decision in this case violated Petitioners' right to procedural due process. The State of Oklahoma decided in 1984 to issue the First Order, thus subjecting Petitioners' oil and gas interests to forced pooling with the interests of other owners. The First Order—together with Policy Statement No. 45—gave clear notice to Petitioners that the First Order had only a well-bore scope, so that an election not to participate would *not* prejudice Petitioners' ability to exploit their leaseholds through participation in later wells to be drilled in the unit. Acting on this notice, Petitioners made an opt-out election under the First Order. But through its decision, the Oklahoma Supreme Court has shifted the consequences of Petitioners' elections 180 degrees: it turns out that Petitioners have elected out of all future enjoyment of their oil and gas rights even though at the time of election Petitioners were told that their opt-out choice would *not* affect their future enjoyment of this property. "Notice that affirmatively misleads in this fashion clearly violates the Constitutional guarantee of

[14]An absence of fair notice may well lead to a lack of meaningful hearing. Unfair notice destroys the right to present all defenses, eliminates consideration of essential elements of the case, and effectively excludes relevant issues—all in violation of fundamental due-process standards. *Barry v. Barchi,* 443 U.S. 55, 66 (1979); *Lindsey v. Normet,* 405 U.S. 56, 66 (1972); *Bell v. Burson,* 402 U.S. 535, 542 (1971); *Holt v. Virginia,* 381 U.S. 131, 136 (1965).

due process." *Butland v. Bowen,* 673 F. Supp. 638, 641 (D. Mass. 1987).[15]

This case shows how key adequate notice is. Because all parties affected by the First Order were notified that a non-participation election would only transfer their oil and gas interests in the proposed first well, many elected not to participate in that well. Why? Because those owners knew that Inexco was drilling in the wrong place; they knew that Inexco was drilling a marginal producer and that it was not worth sharing the costs to share in minimal, if any, profits. Instead, those owners retained their leasehold interests, waiting for the eventuality that a second (increased density) well would be drilled in the optimal location. *See* R. 51-52. When the applications to drill the second well were eventually filed, those owners desired to participate in that well. Had they been on notice that opting out of the first proposed well would mean being shut out of the second and later wells, neither Petitioners nor any other sane person would have elected out of the entire unit just to avoid sharing the costs of the first (piddling) well.

Notice, especially notice of an either/or election, must be sufficient to meaningfully apprise the recipient of the consequences. "A decision made 'with blinders on,' based on misinformation or lack of information, cannot

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[15] *See Bouie v. Columbia,* 378 U.S. 347, 352 (1964) (precluding conviction based on statute "unforeseeably and retroactively expanded by judicial construction" lest notice provided by statute "lulls the potential defendant into a false sense of security"); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682 (1930) (barring state court's overturning of prior state law where decision retroactively removed any "real opportunity to protect" petitioner's property interest).

be binding as a matter of fairness and due process." *Covington v. Department of Health and Human Services,* 750 F.2d 937, 943 (Fed. Cir. 1984).[16] Petitioners were given notice of a well-bore proceeding; now the Oklahoma Supreme Court is attempting to visit upon them the consequences of a unit-wide proceeding. Petitioners' constitutional rights have been severely abridged.

(III)

The Oklahoma Supreme Court violated due process by rewriting the final judgment of a forced pooling order so as to oust Petitioners of their oil and gas interests which had vested under such judgment.

The Oklahoma Supreme Court's after-the-fact rewriting of the First Order in an entirely separate and collateral proceeding violated not only the takings clause, but also due-process limits on retroactive interference with vested rights. In addition to Petitioners' property rights flowing from their leasehold interests in land, the First Order fixed Petitioners' rights to participate in future wells. The First Order did this through a final and binding adjudicative decree which neither Respondent Inexco nor anyone else chose to appeal. Under settled Oklahoma law, the Commission in issuing forced pooling orders acts in an "adjudicative capacity" as "the functional analogue of a

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[16] *See also McCuin v. Secretary of Health & Human Services,* 817 F.2d 161, 174 (lst Cir. 1987) (valid notice must inform recipient of basic questions that would need to be answered); *Everhart v. Bowen,* 694 F. Supp. 1518, 1526-27 (D. Colo. 1987) (same); *Butland v. Bowen,* 673 F. Supp. 638, 641 (D. Mass. 1987) (misleading notice violates due process).

court of record." *Van Horn Oil Co. v. Oklahoma Corporation Commission,* 753 P.2d 1359, 1363 (Okla. 1988); *Monson v. State ex rel. Oklahoma Corporation Commission,* 673 P.2d 839, 842 (Okla. 1983); Okla. Const. art. 9, § 19. And this Court has recognized repeatedly that "no legislative act can change the rights and liabilities of parties which have been established by a solemn judgment." *Massinghill v. Downs,* 48 U.S. (7 How.) 760, 768 (1849). *Accord, e.g., Hodges v. Snyder,* 261 U.S. 600, 603 (1922) ("It is true that . . . the private rights of parties which has been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation.") Surely, retroactive *judicial* interference with rights fixed in earlier adjudicative orders is no less impermissible than retroactive legislative interference, especially when as here the parties have relied to an extraordinary extent on the earlier order and no identified state interest of any kind supports a new and massive rearrangement of rights fixed by the erstwhile final decree. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 374 (1939).

RELIEF REQUESTED AND CONCLUSION

Petitioners' constitutional rights have been violated in this case. Petitioners accordingly urge the Court to grant certiorari to correct straightaway the lower court's constitutional errors. Petitioners also recognize, however, that this case arises in an unusual procedural posture. In particular, the Oklahoma Supreme Court did not analyze, or indeed even mention, the constitutional contentions made

by Petitioners in that court and reiterated here. As a result, this Court has before it no treatment by any lower court of the constitutional issues now presented for review. In light of these unusual circumstances, Petitioners request in the alternative that this Court grant the petition for certiorari and remand the case to the Oklahoma Supreme Court to consider, or to clarify whether it has considered, Petitioners' constitutional claims.[17] Such a disposition would aid this Court in evaluating whether the issues presented merit its attention. More importantly, such a remand would tend to ensure that Petitioners will not forfeit—through either witting or unwitting state action—their precious constitutional rights.

Respectfully submitted,

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[17] *Cf. Barr v. Matteo*, 355 U.S. 171 (1957) (remand for lower court's consideration of issue presented but not addressed below).

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THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State,

being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Oklahoma Statutes, Supplement, 1988 § 87.1**

§ 87.1 *Common source of supply of oil—Well spacing and drilling units.*

Whenever the production from any common source of supply of oil or natural gas in this state can be obtained only under conditions constituting waste or drainage not compensated by counterdrainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this section provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Corporation Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma; provided, that the Commission may authorize the drilling of an additional well or wells on any spacing and drilling unit or units or any portion or portions thereof or may establish, reestablish, or reform well

** Please see Note at end of this statute.

spacing and drilling units of different sizes and shapes when the Commission determines that a common source of supply contains predominantly oil underlying an area or areas and contains predominantly gas underlying a different area or areas; provided further that the units in the predominantly oil area or areas shall be of approximately uniform size and shape, and the units in the predominantly gas area or areas shall be of approximately uniform size and shape, except that the units in the gas area or areas may be of nonuniform size and shape when they adjoin the units in the oil area or areas; provided further that the drilling pattern for such nonuniform units need not be uniform, and provided further that the Commission shall adjust the allowable production within said common source of supply, or any part thereof, and take such other action as may be necessary to protect the rights of interested parties. Any order issued pursuant to the provisions hereof may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen (15) days' notice of the hearing to be held upon such petition by one publication, at least fifteen (15) days prior to the hearing, in some newspaper of general circulation published in Oklahoma County, and by one publication, at least fifteen (15) days prior to the date of the hearing, in some newspaper published in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 86.1 et seq. of this title, shall govern all proceedings and hearings provided for

by this section.

(b) In case of a spacing unit of one hundred sixty (160) acres or more, no oil and/or gas leasehold interest outside the spacing unit involved may be held by production from the spacing unit more than ninety (90) days beyond expiration of the primary term of the lease.

(c) In establishing a well spacing or drilling unit for a common source of supply thereunder, the acreage to be embraced within each unit shall not exceed six hundred forty (640) acres for a gas well plus ten percent (10%) tolerance, unless a governmental section contains more than six hundred forty (640) acres in which case the unit may comprise the entire section. Provided, however, fractional sections along the state boundary line may be spaced with adjoining section unit, and the shape thereof shall be determined by the Commission from the evidence introduced at the hearing, and the following facts, among other things, shall be material:

(1) The lands embraced in the actual or prospective common source of supply; (2) the plan of well spacing then being employed or contemplated in said source of supply; (3) the depth at which production from said common source of supply has been or is expected to be found; (4) the nature and character of the producing or prospective producing formation or formations; and (5) any other available geological or scientific data pertaining to said actual or prospective source of supply which may be of probative value to said Commission in determining the proper spacing and well drilling unit therefor, with due and relative allowance for the correlative rights and obligations of the producers and royalty owners interested therein.

The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included

in such order; (2) the size, form, and shape of the spacing or drilling units so established; (3) the drilling pattern for the area, which shall be uniform except as hereinbefore provided; and (4) the location of the permitted well on each such spacing or drilling unit. To such order shall be attached a plat upon which shall be indicated the foregoing information. Subject to other provisions of this act, the order establishing such spacing or drilling units shall direct that no more than one well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission, with such exception as may be reasonably necessary where it is shown, upon application, notice and hearing in conformity with the procedural requirements of Sections 86.1 et seq. of this title, and the Commission finds that any such spacing unit is located on the edge of a pool and adjacent to a producing unit, or for some other reason that to require the drilling of a well at the prescribed location on such spacing unit would be inequitable or unreasonable. Whenever such an exception is granted, the Commission shall adjust the allowable production for said spacing unit and take such other action as may be necessary to protect the rights of interested parties.

Any well spacing or drilling unit for a common source of supply thereunder which exceeds six hundred forty (640) acres for a gas well plus ten percent (10%) tolerance or exceeds the total amount of acreage contained in a governmental section, and is not in production or in the process of drilling development on the effective date of this act shall be de-spaced. However, fractional sections along the state boundary line may be spaced with adjoining section unit, and the shape thereof shall be determined by the Commission.

(d) The Commission shall have jurisdiction upon the filing

of a proper application therefor, and upon notice given as provided in subsection (a) above, to decrease the size of the well spacing units or to permit additional wells to be drilled within the established units, upon proper proof at such hearing that such modification or extension of the order establishing drilling or spacing units will prevent or assist in preventing the various types of wastes prohibited by statute, or any of said wastes, or will protect or assist in protecting the correlative rights of persons interested in said common source of supply, or upon the filing of a proper application therefor to enlarge the area covered by the spacing order, if such proof discloses that the development or the trend of development indicates that such common source of supply underlies an area not covered by the spacing order and such proof discloses that the applicant is an owner within the area covered by the application. The Commission shall not establish well spacing units of more than forty (40) acres in size covering common sources of supply of oil, the top of which lies less than four thousand (4,000) feet below the surface as determined by the original or discovery well in said common source of supply. The Commission shall not establish well spacing units of more than eighty (80) acres in size covering common sources of supply of oil, the top of which lies less than nine thousand nine hundred ninety (9,990) feet and more than four thousand (4,000) feet below the surface as determined by the original or discovery well in said common source of supply.

(e) The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other

than that approved by a special order of the Commission authorizing the drilling of such well is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit. The applicant shall give all the owners whose addresses are known or could be known through the exercise of due diligence at least fifteen (15) days' notice by mail, return receipt requested. The applicant shall also give notice by one publication, at least fifteen (15) days prior to the hearing, in some newspaper of general circulation published in Oklahoma County, and by one publication, at least fifteen (15) days prior to the date of the hearing, in some newspaper published in the county, or in each county, if there be more than one, in which the lands embraced within the spacing unit are situated. The applicant shall file proof of publication and an affidavit of mailing with the Commission prior to the hearing. All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of

the oil and gas. The portion of the production allocated to the owner of each tract or interests included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon. Such pooling order of the Commission shall make definite provisions for the payment of cost of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon. The operator of such unit, in addition to any other right provided by the pooling order or orders of the Commission, shall have a lien on the mineral leasehold estate or rights owned by the other owners therein and upon their shares of the production from such unit to the extent that costs incurred in the development and operation upon such unit are a charge against such interest by order of the Commission or by operation of law. Such liens shall be separable as to each separate owner within such unit, and shall remain liens until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order. The Commission is specifically authorized to provide that the owner or owners drilling, or paying for the drilling, or for the operation of a well for the benefit of all shall be entitled to production from such well which would be received by the owner or owners for whose benefit the well was drilled or operated, after payment of royalty, until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order or order settling such dispute. No part of the production or proceeds accruing to any owner of a separate interest in such unit shall be applied toward

payment of any cost properly chargeable to any other interest in said unit.

For the purpose of this section, the owner or owners of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (7/8) interest in and to said rights and a lessor to the extent of the remaining one-eighth (1/8) interest therein. Should the owners of separate tracts or interests embraced within a spacing unit fail to agree upon a pooling of their interests and the drilling of a well on the unit, and should it be established by final, unappealable judgment of a court of competent jurisdiction that the Commission is without authority to require pooling as provided for herein, then, subject to all other applicable provisions of this act, the owner of each tract or interest embraced within a spacing unit may drill on his separately owned tract, and the allowable production therefrom shall be that portion of the allowable for the full spacing unit as the area of such separately owned tract bears to the full spacing unit.

In the event a producing well or wells are completed upon a unit where there are, or may thereafter be, two or more separately owned tracts, the first purchaser or purchasers shall be liable to any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such drilling and spacing unit for the payment of proceeds from the sale of production from the drilling and spacing unit. Each royalty interest owner shall share in all production from the well or wells drilled within the unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, to the extent of such royalty interest owner's interest in the unit. Each royalty interest owner's interest in the unit shall be defined as the percentage of royalty, including the normal one-eighth (1/8)

royalty, overriding royalties or other excess royalties owned in each separate tract by the royalty owner, multiplied by the proportion that the acreage in each separately owned tract or interest bears to the entire acreage of the unit. The first purchaser or purchasers shall also be jointly and severally liable for the payment to each royalty interest owner of any production payments or other obligations for the payment of monies contained within the leases covering any lands lying within the drilling and spacing unit. Nothing in this act shall relieve a lessee or his assignees from any obligations imposed by the lease.

NOTE: This is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here, the pertinent language in the key subsection 87.1(e) has remained unchanged throughout. During the period of this case, subsection 87.1(e) was amended in only two respects:

> —a 1985 amendment further defining royalty interests of owners of producing wells; and
> —a 1988 amendment providing for county-wide, rather than city-wide, location of publishers of publication notice for pooling orders.

Neither amendment is material to the issues raised in this case, whether below or on appeal here.

OKLAHOMA
CORPORATION COMMISSION

JIM THORPE OFFICE BUILDING

OKLAHOMA CITY, OKLAHOMA 73105

To: All Commission Staff and the Mineral Bar

FROM: Hamp Baker
Norma Eagleton
James B. Townsend

DATE: May 3, 1984

STATEMENT OF POLICY

The purpose of this Statement of Policy is to set forth, without reservation, this Commission's policy as to the question: Does a pooling order determine the rights and equities only as to the well which is proposed to be drilled under the order (pool per wellbore) or does a pooling order determine the rights and equities as to the well proposed under the order as well as all possible increased density wells which might be drilled in the unit (pool per unit)?

"Pooling by the unit" is a question of legal interpretation and semantics. Since the statute only permits one well per drilling and spacing unit, the practical effect has been to pool by the wellbore despite the language found in 52 O.S. Supp. 1983, § 87.1, which speaks to development of the unit as a unit. Recently, this Commission has broken with that practice. At the time of our decisions in those cases, seemingly compelling factual

bases were presented for issuing an order which pooled not only the initial well but also any increased density wells.

However, reflecting on those few orders which we have issued previously pooling per unit, this Commission has reevaluated that position. The question of whether pooling should be accomplished by the wellbore or by the unit in anticipation of the possibility of increased density wells, is, in the end, a question of interpretation of law; specific factual circumstances are irrelevant. As such, the Commission believes that it is important to the continuing vitality of the industry, especially with regard to increased drilling investment, to rely on this Commission's expertise and oversight capacity in adopting and stating categorically a uniform policy on which all elements of the industry can rely.

The policy of this Commission is to pool, without exception, by the wellbore for the following reasons:

1. Although 52 O.S. Supp. 1983, § 87.1, speaks to development of the unit as a unit, it is also equally clear that, by the same statute, only one well is authorized per drilling and spacing unit.

2. In order for this Commission to authorize the drilling of additional wells on a unit—increased density wells—the spacing order authorizing only one well per unit must be amended.

3. By pooling per unit, development and the flow of participation dollars is being inhibited. Parties who would otherwise invest and participate in the drilling of developmental wells are precluded from such participation based on their, or their predecessors in interest, decision regarding the initial well in the unit.

4. Due to the prospect of inhibited development and concomitant inhibited flow of participation dollars, the only alternative available is that of despacing. Such alternative is not desirable since such a scheme will only serve to leave spacing "windows" and therefore not serve to protect correlative rights.

5. The industry, mineral bar and mineral interest owners have a right to expect consistency in the decisions of this Commission. Following the Oklahoma Supreme Court's decision in *Monson v. State ex rel. Oklahoma Corporation Commission*, No. 57,867 (December 12, 1983), finding this Commission to be a functional analogue of a court of record, it is of prime importance that this Commission provide some degree of certainty in its decision-making. However, this is not to say that this administrative agency intends to adhere strictly to the doctrine of stare decisis in its decision-making.

The Commission is also cognizant that three of the recent orders pooling as to the unit have been appealed to the Oklahoma Supreme Court. To the ends expressed in this Statement of Policy, it is our intention to move the Court to remand those cases to the Commission for further deliberation.

We would also specifically state that this Statement of Policy in no way relates to the drilling of substitute or twin wells. The issue which has been presented to us in such cases is whether there has been a continuous operation in the drilling of a well; *Amarex Inc. v. Baker,* 655 P.2d 1040 (Okl. 1983); or whether some geologic or engineering reason exists which would necessitate the drilling of a substitute or twin well. As a separate issue, the possibility of the need for such well has been addressed on a case by case determination, based on the geologic and/or engineering evidence submitted. Such issue is not addressed nor is it concerned with the question presented herein.

S/ _____
Hamp Baker, Chairman

S/ _____
Norma Eagleton, Vice-Chairman

S/ _____
James B. Townsend, Commissioner

HB:NE:JBT/GH:alj/bl

Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

APPEAL FROM THE CORPORATION COMMISSION
OF OKLAHOMA

Corporation Commission, in Order No. 260474 forced pooled a 640-acre drilling and spacing unit and eight named common sources of supply. In Order No. 277146, the Commission repooled the unit and designated a new operator. From Order No. 277146, the original operator timely appeals.

CORPORATION COMMISSION ORDER NO. 277146 REVERSED.

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Nova Energy Corp.

DOOLIN, C.J.

The question we address today is whether the Corporation Commission, by repooling a previously pooled 640 acre drilling and spacing unit, made an error law and exceeded its jurisdiction. We answer in the affirmative.

The Corporation Commission, in Order No. 197226, created a 640 acre drilling and spacing unit and named eight common sources of supply underlying Section 23, T12N, R14W, Custer County, Oklahoma. Inexco (operator) obtained Order 260474 force pooling the spacing unit and the eight common sources of supply "as a *unit,* and the rights and equities of all oil and gas owners covered hereby are pooled, adjudicated, and determined." [emphasis added] The order required the owners to either participate by paying their share of the costs of drilling and completing the well or elect to accept a bonus. The owners could accept a cash bonus of $1,250 per acre plus an overriding or excess royalty of 1/16 of 8/8, or a non-cash bonus of an overriding or excess royalty of 1/8 of 8/8. Ward Petroleum accepted the cash bonus. Vierson Oil & Gas, Nova Energy's predecessor in interest, accepted the non-cash bonus. The order named Inexco as the operator.

Inexco drilled the Wolfe #1-23 in the Des Moines common source of supply Inexco planned to drill an increased density

well in this same formation. A dispute arose between Inexco and Ward as to where this increased density well should be located. Ward applied to the Corporation Commission to repool Section 23 and the eight named common sources of supply, and also sought to be designated the operator. Inexco filed an application asserting its status as the operator. Inexco filed an application asserting its status as the operator. Both applications were consolidated for hearing. The Hearing Officer concluded Order 260474 force pooled the well-bore, not the unit; that Section 23 and five named sources of supply, including the Des Moines, should be repooled; and named Ward as operator and Nova as alternate operator. The Commission, sitting en banc, upheld the Hearing Officer's report and issued Order 277146. From this Commission order Inexco timely appeals.

Inexco correctly states the standard of review: absent an assertion of a violation of a constitutional right, our review is confined to a determination of whether the Commission exceeded its authority and whether the findings of the Commission are sustained by the law and by substantial evidence. Okla. Const. Art IX, §20, cl. 3. We find, first, an error of law, and second, the Corporation Commission exceeded its jurisdiction by issuing Order No. 277146.

I.

The Hearing Officer found Order No. 260474 force pooled the well-bore, not the unit. This clearly was erroneous. The order force pooled the entire unit, not just the well-bore. *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203, 206 (Okl. Ct. App. 1986) (Adopted by the Supreme Court Feb. 9, 1988). Order No. 260474 required Ward and Vierson, Nova's predecessor in interest, to participate in the costs of drilling and completing Wolfe #1-23 or accept a bonus in lieu of

participation. Ward and Vierson elected to accept a bonus. Once the election period passed, the property interest of the affected parties vested. *Ranola Oil Co. v. Corporation Commission,* 752 P.2d 1116, 1119 (Okl. 1988). Once vested, the property rights of the parties were beyond the reach of the Commission's power to modify. *Id.; Crest Resources v. Corporation Commission,* 617 P.2d 215, 218 (Okl. 1980). By accepting the bonus, Ward assigned its exploratory rights to Inexco, the operator, and can assert no right to participate in the subsequent increased density well. Similarly, Nova, as Vierson's successor in interset[sic], can assert no right to participate in the subsequent increased density wells. *Ranola,* 752 P.2d at 1119. Once the bonus was paid, Inexco's property rights vested. *Id.*

II.

The Corporation Commission acted in its adjudicatory capacity when it issued Order 277146. *Amoco,* 751 P.3d at 207; *Harry R. Carlile Trust v. Cotton Petroleum,* 732 P.2d 438, 442 (Okl. 1986). When acting in its adjudicatory capacity, the Commission is to be treated as the functional analogue of a court of record, *Munson v. State, ex rel. Corporation Commission,* 673 P.2d 839, 842 (Okl. 1983), and is a tribunal of limited jurisdiction. *Hunton Oil v. Atchison, T. & S.F. Ry. Co.,* 738 P.2d 191, 193 (Okl. 1987); *Tenneco Oil Co. v. El Paso Natural Gas,* 687 P.2d 1049, 1050 N.1 (Okl. 1984). A question concerning jurisdiction may be raised at any time by the parties and by the Court on its own motion, which rule applies to orders and decrees of the Corporation Commission. *Tenneco,* at 1052. A pooling order when free from vitiating infirmity, is *res judicata,* but some terms of a prior pooling order may be modified upon changed conditions. *Crest Resources,* 617 P.2d 218 n. 4; *Buttram Energies v. Corporation Commission,* 629 P.2d 1252,

1254 (Okl. 1981). The power to change a previous order requires a showing before the Commission of a change in conditions or knowledge of conditions necessitating the repeal, amendment or modification. Failure to make such a showing renders an attempt to modify a prior order subject to the prohibition on collateral attacks set forth by the Legislature in 52 O.S. 1981, §111. *Nilsen v. Ports of Call Oil Co.,* 711 P.2d 98, 102 (Okl. 1985).

Here, when the Commission issued Order 277146, it, in effect, vacated Order 260474 by repooling the unit and by naming Ward as the operator and Nova as the alternate operator. Ward and Nova offered no evidence of changed conditions, or of an infirmity in the original pooling order. By repooling section 23, absent changed conditions or an infirmity in the original pooling order, the Commission exceeded its statutory authority. Inasmuch as we dispose of this appeal on the question of statutory grounds, it is not necessary for us to decide whether, in light of *Ranola,* Ward or Nova had standing as bonus takers to apply to the Commission for repooling order issued by the Commission, which required another selection to either participate or accept a bonus in lieu of participation, divested Inexco of its property rights in violation of substantive due process. It is enough that the Commission exceeded its jurisdiction and, as a result, Order 277146 cannot stand.

Corporation Commission Order No. 277146 is REVERSED.

Doolin, C.J., Hargrave, V.C.J., Hodges, Lavender, Opala, Wilson, Kauger, Summers, JJ.;—concur.

Simms, J.—concurs by reason of state decisis.

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

ORDER NO. 277146

CAUSE C.D. NO. 122874

Applicant: Ward Petroleum Corporation

In the matter of adjudicating the rights and equities of oil and gas owners and designating the applicant or some other party as operator for the Tonkawa, Cottage Grove, Marchand, Cleveland, Des Moines, Atoka, Morrow and Springer common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

CAUSE C.D. NO. 123461

Applicant: Inexco Oil Company

In the matter of pooling oil and gas interests, designating applicant or some other party as operator, and adjudicating the rights and equities of oil and gas owners in the Tonkawa, Cottage Grove, Cleveland, Marchand, Des Moines and Atoka common sources of supply underlying Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

REPORT OF THE CORPORATION COMMISSION

This cause came on for hearing before Delores Joy Bledsoe, Hearing Officer for the Corporation Commission of the State of Oklahoma, on the 19th day of March, 1985, at 8:30 a.m., in the Commission Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, for the purpose of hearing, taking

testimony and reporting her findings and recommendations to the Commission.

Michael D. Stack, Attorney, appeared for the Applicant, Ward Petroleum Corporation; Alice S. Mitchell and John J. Morozuk, Attorneys, appeared for Inexco Oil Company; John C. Moricoli Jr., Attorney, appeared for Greenleaf Energy Company; Richard J. Gore, Attorney, appeared for Nova Energies; James W. George, Attorney, appeared for McFarlane Company and Trimble Properties; Jerry Cord Wilson, Attorney, appeared for David M. Pulling, James E. Kuhlman and Thomas Wygant; Rod W. Ylitalo, P.O. Box 10102, Enid, Oklahoma, 73702, appeared pro se; and Cheri Wheeler, Deputy General Counsel for Conservation, appeared for the Commission.

The Hearing Officer heard the Cause and filed her report with the Commission, Exceptions to the Initial Report of the Hearing Officer were timely filed by Inexco Oil Company and Ward Petroleum Corporation; Motion to Advance Exceptions was granted by the Commission on April 15, 1985 at which time Exceptions were heard, and the Commission therefore voted 2 to 1 to uphold the Hearing Officer's Report and finds as follows:

FINDINGS

1. a. That this is the application of Ward Petroleum Corporation for an Order pooling the interests and adjudicating the rights and equities of oil and gas owners in the Tonkawa, Cottage Grove, Marchand, Cleveland, Des Moines, Atoka, Morrow and Springer common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma. The respondents named in this Order are listed on the Exhibit "A" attached.

b. That this is the application of Inexco Oil Company, for an Order pooling the interests and adjudicating the rights and equities of oil and gas owners in the Tonkawa, Cottage Grove, Cleveland, Marchand, Des Moines and Atoka common sources of supply underlying Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

2. That the Commission has jurisdiction over the subject matter herein; that notice has been given in all respects as required by law and by the rules of the Commission. That Applicants are the owners of an interest in the area covered by the Applications.

That at the time of hearing the Atoka, Morrow and Springer common sources of supply were dismissed from Cause C.D. No. 122874 application for Ward Petroleum Corporation.

3. That the land described in paragraph 1 above is a drilling and spacing unit for the common sources of supply also named in paragraph 1, all heretofore Ordered by the Commission in Order No. 197226 as amended by Order No. 274173 (increased density order) and Order No. 274669 (location exception order).

4. That the Applicants are owners of the right to drill on said drilling and spacing unit and to develop and produce said common sources of supply, have not agreed with all of the other such owners in such drilling and spacing unit to pool their interests and to develop the drilling and spacing unit and common sources of supply, and the Commission should issue an Order requiring such owners to pool and develop the drilling and spacing unit and common sources of supply covered hereby.

5. That the Applicants propose to develop said unit and the common sources of supply therefore by the drilling of a well

thereon and, to avoid the drilling unnecessary wells and to protect correlative rights, all owners should be required to pool and develop the unit and common sources of supply covered hereby, upon the terms and conditions set out in "Order" below, all of which are found hereby, after a consideration of the substantial evidence in this Cause, to be just and reasonable and will afford each owner in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the production from the unit.

6. That the Hearing Officer proceeded to hear the causes and reported as follows:

(a) That Ward Petroleum Corporation called their first witness, Michael Cocheres, and he testified that he was familiar with the application and further testified that Ward Petroleum Corporation has the right to drill a well to test the formations named in the caption underlying Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma. The witness for Ward Petroleum Corporation testified that Ward should be named as operator of the proposed well for the following reasons:

(i) Ward Petroleum Corporation and its et als own or control 338 acres of the unit.

(ii) Ward Petroleum Corporation has submitted an AFE turnkey contract for the drilling of the test well.

(iii) Inexco Oil Company has not guaranteed their cost for drilling of the test well.

(iv) Ward Petroleum Corporation and Inexco Oil Company have previously had dealings with Inexco's drilling of a dryhole in the SE/4 of the section. Ward Petroleum Corporation then recommended

to drill a well in the north portion of the section but Inexco elected to drill an additional well in the southern part of the unit; the Wolf #1 was then drilled and Ward Petroleum Corporation didn't contest operations and elected not to participate in the drilling of said well. Inexco was advised that Ward Petroleum Corporation did not wish to participate in a well drilled in the south portion of the unit and further requested that Inexco Oil Company write a confirmation letter (marked as Exhibit 26) in which to show that Inexco would not relocate the well after Ward Petroleum Corporation elected not to participate pursuant to previous Force Pooling Order No. 260474.

(v) Ward Petroleum Corporation supports the Commission's position that a forced pooling is limited to a well bore only and, therefore, recommends Ward Petroleum Corporation be named operator of this subsequent well.

Inexco Oil Company then submitted evidence that by Cause C.D. No. 108567, Order No. 260474, that Inexco Oil Company acquire all interest of Ward Petroleum Corporation. That Order No. 260474 force pooled the rights and equities of all parties on a unit basis and, therefore, any respondent that elected not to participate in the drilling of the Wolf #1 well would no longer have the right to participate in subsequent wells in the unit. Based upon the evidence presented at the hearing on the merits, it was the conclusion of the Hearing Officer that Ward Petroleum Corporation be named operator until May 1, 1985. Should Ward Petroleum Corporation not initiate operations by said date then Nova Energy shall have the right to com-

mence operations up to June 1, 1985. It is further recommended that should Nova Energy not commence operations on or before June 1, 1985, that operations shall revert back to Ward Petroleum Corporation for the remaining 180 days from the date of this Order. The Hearing Officer further recommends that all parties electing to participate in the drilling of the proposed well shall have the right to a casing point election.

7. That in the interest of the prevention of waste and the protection of correlative rights, these Applications should be granted as hereinafter set forth, and the rights of all owners pooled and adjudicated.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of Oklahoma as follows:

1. That Operator proposes to develop Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma, a drilling and spacing unit for the Tonkawa, Cottage Grove, Marchand, Cleveland and Des Moines separate common sources of supply, and to develop said unit and the common sources of supply therefore, and the rights and equities of all oil and gas owners covered hereby are pooled, adjudicated, and determined.

2. a. That estimated well costs are:
Completed for production—$1,327,050.00
Completed as a dry hole —$ 913,500.00

b. That $2,700.00 per acre cash, plus an overriding or excess royalty of 1/16 of 8/8, is also a fair, reasonable, and equitable bonus to be paid unto each owner who elects not to participate in said well by paying such owner's proportionate part of the cost

thereof; such cash bonus plus overriding or excess royalty, when paid as set out in this Order, is satisfaction in full for all rights and interests of such owner in the well covered hereby, except for any normal 1/8 royalty interest, as defined in 52 O.S. Section 87.1(e) (1971).

c. That in lieu of such cash bonus plus an overriding or excess royalty, an owner may elect to have delivered unto him, as his just and fair share of the production from such well, in addition to the normal 1/8 royalty interest as defined in 52, O.S., Section 87.1(e) (1971), his proportionate part of an undivided 1/8 of 8/8 on oil and casinghead gas, and 1/8 of 8/8 on natural gas and natural gas condensate, produced form any well drilled under this Order, same to be delivered into the lease tank or into the pipeline to which any such well is connected, free and clear of all costs, expenses, and risks incurred in connection with the drilling, testing, completing, equipping, operating, and producing of any such well covered hereby, with the option, after Operator has recouped out of the net proceeds derived from the sale of oil and gas from the well covered hereby all cost of drilling, testing, equipping, completing and operating of the well covered hereby; to convert a 1/16 of 8/8 overriding excess royalty into a 50% share of the working interest in oil and gas production from said well is also a fair, reasonable and equitable option to be paid unto each owner who elects not to participate in said well. Respondents delivery of a 50% net revenue interest shall increase to a 81.25% net revenue interest

after Respondents elect the backin; however, this option to convert to a 50% working interest will not be available to those Respondents who cannot deliver to the Operator said 81.25% revenue interest. The 50% working interest will be proportionately reduced to the interest share in said well which such owner would have had in such well had such owner participated in such well by paying costs from the inception thereof, with such proportionately reduced working interest share to bear and pay a like proportionate part of the normal 1/8 royalty defined as aforesaid, and any additional production share set out herein or otherwise burdening the working interest of such electing owner. "Net proceeds" as used herein shall mean the gross proceeds less taxes measured on the quantum of production (including gross property tax, etc.), royalty, overriding royalties and other payments to be paid out of production from the well. If said owner elects to convert to the proportionately reduced working interest, then such owner shall thereafter bear and pay a like share of the operating costs. Such election shall be made in writing to Operator within 30 days after notification by Operator that such costs have been recovered. Failure to make a timely and proper election shall be deemed an election to retain the overriding excess royalty and *not* to take the backin interest.

PROVIDED, however, that any excess royalty, overriding royalty, or other payments out of production shall be charged against the overriding or excess royalty, or overriding royalty, as hereinabove set forth, and same shall be reduced by the amount of any such excess.

AND PROVIDED, in the event the oil and gas interest of any owner is subject to any royalty, overriding royalty, or other payments out of production which create a burden on such interest in excess of the burdens set out in paragraph 2b above, the owner of any such interest shall not be entitled to the option provided in paragraph 2b above, but shall be required to either participate or to accept the additional royalty provided in paragraph 2c above.

3. That any owner of the right to drill on said drilling and spacing unit who has not agreed with the Operator to develop said unit and common sources of supply is accorded the following elections as to all or any part of such owner's interests as to each election:

a. To participate in the development of the unit and common sources of supply by agreeing to pay such owner's proportionate part of the actual cost of the well covered hereby and paying, as set out herein, to Operator such owner's proportionate part of the estimated completed for production cost thereof, as set out in paragraph 2a above, or by securing or furnishing security for such payment satisfactory to the Operator so as to assure timely payment of such cost; in all events such owner's cost in said well shall not exceed its proportionate part of the actual or the reasonable cost thereof which shall be determined by the Commission in the event there is a dispute as to such costs; the payment of such owner's proportionate part of the estimated completed for production costs of said well, or the securing of such costs, or the furnishing of security therefore, as aforesaid, shall be accomplished within 20 days from the date of this

Order, such owner's proportionate part of the costs of, and of the production from such well and unit, to be in proportion to the number acres such owner has in the unit; or,

b. To receive the cash bonus overriding or excess royalty, as set out in paragraph 2b above, which shall be paid or tendered, if same can be paid or tendered, within 30 days from the date of this Order, or, if any payment of any such party entitled to such payment, then said bonuses, and any royalty payments due such party, shall be paid into an escrow or trust account and shall not be commingled with any funds of the applicant or operator. Such funds deposited in said escrow or trust account shall be held for the exclusive use of, and sole benefit of, the party or parties entitled thereto.

If any payment of bonus due and owing under this Order cannot be made because the person entitled thereto cannot be located or is unknown, then said bonus shall be paid into an escrow account within ninety (90) days after this Order and shall not be commingled with any funds of the Operator. Any royalty payments or other payments due to such person shall be paid into an escrow account by the holder of such funds. Responsibility for filing reports with the Commission as required by law and the Commission rule as to bonus, royalty or other payments deposited into escrow accounts shall be with the applicable holder. Such funds deposited in said escrow accounts shall be held for the exclusive use of, and sole benefit of, the person entitled thereto. It shall be the responsibility of the Operator to

notify all other holders of this provision and of the Commission rules regarding unclaimed monies under pooling orders.

(See attached Exhibit "A" for list of Respondents).

c. To receive in lieu of the cash bonus plus overriding or excess royalty, as set out in paragraph 2b above, the overriding or excess royalty only as set out in paragraph 2c above.

4. That each owner of the right to drill in said drilling and spacing unit to said common sources of supply covered hereby, who has not agreed to develop said unit, other than the Operator, shall elect as to all or any part of the interests of such owner in the unit which of the elections set out in Paragraph 3 above such owner accepts, said election to be made to Ward Petroleum Corporation, in writing, within 15 days from the date of this Order; in the event any owner fails to elect within the time and in the manner as set out above which of the alternatives set forth in paragraph 3 above, any such owner accepts, then such owner is deemed to have elected to receive the cash bonus plus excess royalty as set out in paragraph 2b above unless the owner is subject to any royalty, overriding royalty, or other payments out of production which create a burden on such interest in excess of the burdens set out in paragraph 2b above, the owner of any such interest shall not be entitled to the option provided in paragraph 2b above, but shall be required to accept the additional royalty provided in paragraph 2c above; in the event any owner elects to do other than participate in said well by paying his pro rata share of the costs thereof, or fails to make any election provided above, such owner shall be deemed to have relinquished unto Ward Petroleum Corporation all of such owner's right, title, interest, or claim in and to the unit

well, except for any normal 1/8 royalty interest, defined above, and other share in production to which such owner may be entitled by reason of an election hereunder.

5. That Operator, in addition to any other rights provided herein, shall have a lien, as set out in 52 O.S., Section 87.1(e) (1971), on the interest of any owner, subject to this Order, who has elected to participate in any well covered hereby by paying such owner's proportionate part of the costs thereof; provided, however, that in the event an owner elects to participate in said well by paying his proportionate part of the costs thereof and fails or refuses to pay or to secure the payment of such owner's proportionate part of the completed for production cost as set out in paragraph 2a above, or fails or refuses to pay or make an arrangement with Ward Petroleum Corporation for the payment thereof, all within the periods of time as prescribed in this Order, then such owner is deemed to have elected to receive the cash bonus plus excess royalty as set out in paragraph 2b above unless the owner is subject to any royalty, overriding royalty, or other payments out of production which create a burden on such interest in excess of the burdens set out in paragraph 2b above, the owner of any such interest shall not be entitled to the option provided in paragraph 2b above, but shall be required to accept the additional royalty provided in paragraph 2c above. Thereupon, the payment of such cash bonus shall be made by Ward Petroleum Corporation within 30 days after the last day on which such defaulting owner, under this Order should have paid his proportionate part of such costs or should have made satisfactory arrangements for the payment thereof.

6. That: Ward Petroleum Corporation
P. 0. Box 1187
Enid, Oklahoma 73702

is designated Operator of the well and the common sources of

supply covered hereby and all elections must be communicated to said Operator at the address above as required in this Order. That Operator, Ward Petroleum Corporation and Nova Energies have the proper surety and plugging bond on file.

7. That Operator Ward Petroleum Corporation must commence operations for the drilling for other operations with respect to the well on or before 11:59 p.m. on May 1, 1985 and diligently prosecute the same to completion in a reasonably prudent manner, or Nova Energies shall have the option to commence operations, said election to be exercised within 48 hours of 11:59 p.m. May 1, 1985, for the drilling of the well and diligently prosecute the same to completion in a reasonably prudent manner; should Nova Energies not commence operations by 11:59 p.m. June 1, 1985 and diligently prosecute the same to completion, then the operations shall automatically revert back to Ward Petroleum Corporation who must diligently prosecute the operations with respect to the well covered hereby within 180 days from the date of this Order and diligently prosecute the same to completion in a reasonably prudent manner, or this Order shall be of no force and effect, except as to the payment of the cash consideration by Ward Petroleum Corporation reflected in paragraph 2b of this Order.

8. That the Operator, in addition to any other rights provided herein, shall allow all respondents who elect to participate in the drilling of the test well the right to a casing point election. All respondents who elect to participate in the test well shall elect within 24 hours after receipt of logs on the test well whether to consent in the completion of the test well and thereby paying their share of the completion cost attributable to their interest. Failure to make a timely and proper election shall be determined to be an election *to participate* in the completion of the test well. Further should any participant in the drilling of the test well not participate in the completion attempt, then that

the test well not participate in the completion attempt, then that party shall relinquish all of its interest in said well to the parties who have acquired the non-consenting parties' interest.

9. That the Ward Petroleum Corporation or its attorney shall file with the Secretary of the Commission, within 10 days from the date of this Order, an affidavit stating that a copy of said Order was mailed within 3 days from the date of this Order to all parties pooled by this Order, whose addresses are known.

DONE AND PERFORMED this day of April, 1985.

CORPORATION COMMISSION OF OKLAHOMA

S/ _____
Chairman, James B. Townsend

_____
Vice Chairman, Norma Eagleton

S/ _____
Commissioner, Hamp Baker

ATTEST:

S/ _____
Secretary, Berdee S. Holt

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One West Third St.
Tulsa, OK 74103

Kaiser-Francis Oil Company
P. 0. Box 21468
Tulsa, OK 74121-1468

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3611 S. 133 E. Ave.
Tulsa, OK 74134

An-Son Corporation
P. 0. Box 24060
Oklahoma City, OK 73124

Vierson Oil and Gas Company
P. 0. Box 280
Okmulgee, OK 74447

Petroleum Corporation of Texas
P. 0. Box 911
Breckenridge, TX 76024

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c/o Jack Ezell
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400 N. Olive
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Harry H. Cullen
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Enid, OK 73702

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Oklahoma City, OK 73102

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Trimble Properties
Trimble Building
El Dorado, AR 71730

James E. Kuhlman
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Oklahoma City, OK 73102

Ward Petroleum Corp.
P. 0. Box 1187
Enid, OK 73702

UNKNOWN
None

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

ORDER NO. 260474

CAUSE CD NO. 108567

Applicant: Inexco Oil Company

In the matter of pooling oil and gas interests, designating applicant or some other party operator and adjudicating the rights and equities of oil and gas owners in the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

REPORT OF THE COMMISSION

This Cause came on for hearing before Jodi B. Levine, Trial Examiner for the Corporation Commission of the State of Oklahoma, on the 20th day of April, 1984, at 9:00 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Alice S. Mitchell, Attorney, appeared for Inexco Oil Company; Michael Stack, Attorney, appeared for Ward Petroleum; Gordan D. Ryan, Attorney, appeared for Vierson & Cochran; and, M. Keywood Deese, Deputy General Counsel for Conservation, filed notice of appearance.

The Trial Examiner heard this Cause and filed her report with the Commission. Ward Petroleum filed exceptions to the Report which were withdrawn prior to hearing on appeal. The Report has been considered and the Commission therefore finds as follows:

FINDINGS

1. That this is the Application of Inexco Oil Company to pool and adjudicate the rights and equities of oil and gas owners in the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma as previously spaced by Order No. 197226. At the time of the hearing, the Morrow and Springer common sources of supply were dismissed, and Steve Knox and Samson Resources were dismissed as parties to the Cause.

2. That the Commission has jurisdiction over the subject matter herein; that notice has been given in all respects as required by law and by the rules of the Commission. That the Applicant is the owner of an interest in the area covered by the Application. That the Applicant has furnished the Oklahoma Corporation Commission with a plugging agreement and surety or a financial statement, as required by the law and by the rules of the Commission.

3. That the land described in paragraph 1 above is a drilling and spacing unit for the common sources of supply also named in paragraph 1, all heretofore Ordered by the Commission by Order No. 197226.

4. That Inexco Oil Company, an owner of the right to drill a well on said drilling and spacing unit and to develop and produce said common sources of supply, has not agreed with all of

the other such owners in such drilling and spacing unit to pool their interests and to develop the drilling and spacing unit and common sources of supply, and the Commission should issue an Order requiring such owners to pool and develop the drilling and spacing unit and common sources of supply covered hereby.

5. That Inexco Oil Company proposes to develop said unit and the common sources of supply therefor by the drilling of a well thereon and, to avoid the drilling of unnecessary wells and to protect correlative rights, all owners should be required to pool and develop the common sources of supply covered hereby, upon the terms and conditions set out in "Order" below, all of which are found hereby, after a consideration of the substantial evidence in this Cause, to be just and reasonable and will afford each owner the opportunity to recover or receive without unnecessary expense his just and fair share of the production.

6. That in the interest of the prevention of waste and the protection of correlative rights, this Application should be granted, and the rights of all owners pooled and adjudicated.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of Oklahoma as follows:

1. That Inexco Oil Company proposes to drill a well in Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma, a drilling and spacing unit for the Des Moines, Tonkawa, Cottage Grove, Atoka, Cleveland, and Marchand separate common sources of supply, and to develop said unit and the common sources of supply therefor as a unit, and the rights and equities of all oil and gas owners covered hereby are pooled, adjudicated, and determined.

2. a. That estimated well costs are:
   Completed for production—$1,598,250
   Completed as a dry hole —$1,194,250

   b. That $1250.00 per acre cash, plus an overriding or excess royalty of 1/16 of 8/8, is a fair, reasonable and equitable bonus to be paid unto each owner who elects not to participate in said well by paying such owner's proportionate part of the costs thereof; such cash bonus plus overriding or excess royalty, when paid as set out in this Order, is satisfaction in full for all rights and interests of such owner in the well covered hereby, except for any normal 1/8 royalty interest, as defined in 52 O.S., Section 87.1(e) (1971).

   c. That an overriding or excess royalty of 1/8 of 8/8 is also a fair, reasonable, and equitable bonus to be tendered unto each owner who elects not to participate in said well by paying such owner's proportionate part of the cost thereof; such overriding or excess royalty is satisfaction in full for all rights and interests of such owner in the well covered hereby, except for any normal 1/8 royalty interest, as defined in 52 O.S., Section 87.1(e) (1971).

   PROVIDED, However, that any excess royalty, overriding royalty, or other payments out of production shall be charged against the overriding or excess royalty, or overriding royalty, as hereinabove set forth, and same shall be reduced by the amount of any such excess.

   PROVIDED, further, in the event the oil and gas interest of any owner is subject to any royalty, overriding royalty, or other payments out of production which create a burden on such interest in excess of

the burdens set out in paragraph 2b above, the owner of any such interest shall not be entitled to the option provided in paragraph 2b above, but shall be required to either participate or to accept the additional royalty provided in paragraph 2c above.

3. That any owner of the right to drill on said drilling and spacing unit who has not agreed with Inexco Oil Company to develop said unit and common sources of supply is accorded the following elections:

a. To participate in the development of the unit and common sources of supply by agreeing to pay such owner's proportionate part of the actual costs of the well covered hereby and by paying, as set out herein, to Applicant such owner's proportionate part of the estimated completed for production costs thereof, as set out in paragraph 2a above, or by securing or furnishing security for such payment satisfactory to the Applicant; in all events, such owner's costs in said well shall not exceed its proportionate part of the actual or the reasonable costs thereof which shall be determined by the Commission in the event there is a dispute as to such costs; the payment of such owner's proportionate part of the estimated completed for production costs of said well, or the securing of such costs, or the furnishing of security therefor, as aforesaid, shall be accomplished within 20 days from the date of this Order, such owner's proportionate part of the costs of, and of the production from, such well to be in proportion to the number of acres such owner has in the unit; or,

b. To receive the cash bonus plus overriding or excess royalty, as set out in paragraph 2b above, which cash

bonus shall be paid or tendered, if same can be paid or tendered, within 30 days from the date of this Order, or, if same cannot be paid or tendered, a fund therefor created for the use and benefit of any owner accepting or deemed to have accepted such cash bonus plus overriding or excess royalty. Such funds deposited in said escrow or trust account shall be held for the exclusive use and sole benefit of the party or parties entitled thereto. If any payment of bonuses due and owing under the order cannot be made to any part entitled to such payment, then said bonuses, and any royalty payments received by the Operator due such party, shall be paid into an escrow or trust account and shall not be commingled with any funds of the Applicant or Operator.

c. To receive in lieu of the cash bonus plus overriding or excess royalty, as set out in paragraph 2b above, the overriding or excess royalty only as set out in paragraph 2c above.

4. That each owner of the right to drill in said drilling and spacing unit to said common sources of supply covered hereby, who has not agreed to develop said unit other than the Applicant, shall elect which of the alternatives set out in paragraph 3 above such owner accepts, said election to be made to Inexco Oil Company, in writing, within 15 days from the date of this Order; in the event any owner fails to elect within the time and in the manner as set out above which of the alternatives set forth in paragraph 3 above, any such owner accepts, then such owner is deemed to have elected to receive the cash bonus plus excess royalty, as set out in paragraph 2b above; however, if the interest is burdened in excess of a 1/16 x 8/8 over and above the

normal 1/8 royalty then such owner is deemed to have accepted the alternative set out in paragraph 2c above. In the event any owner elects to do other than participate in said well by paying his pro rata share of the costs thereof, or fails to make any election provided above, such owner shall be deemed to have relinquished unto Inexco Oil Company all of such owner's right, title, interest, or claim in and to the well, except for any normal 1/8 royalty interest, defined above, or other share in production to which such owner may be entitled by reason of an election hereunder.

5. That Inexco Oil Company, in addition to any other rights provided herein, shall have a lien, as set out in 52 O.S., Section 87.1(e) (1971), on the interest of any owner, subject to this Order, who has elected to participate in the well covered hereby by paying such owner's proportionate part of the costs thereof; provided, however, that in the event an owner elects to participate in said well by paying his proportionate part of the costs thereof and fails or refuses to pay or to secure the payment of such owner's proportionate part of the completed for production costs as set out in paragraph 2a above, or fails or refuses to pay or make an arrangement with the Applicant for the payment thereof, all within the periods of time as prescribed in this Order, then such owner is deemed to have elected to receive the cash bonus plus excess royalty, as set out in paragraph 2b above; however, if the interest is burdened in excess of a 1/16 x 8/8 over and above the normal 1/8 royalty then such owner is deemed to have accepted the alternative set out in paragraph 2c above. Thereupon, the payment of such cash bonus shall be made by Applicant within 30 days after the last day on which such defaulting owner, under this Order, should have paid his proportionate part of such costs or should have made satisfactory arrangements for the payment thereof.

6. That: INEXCO OIL COMPANY
The Energy Plaza—Suite 1000
3030 N.W. Expressway
Oklahoma City, Oklahoma 73112
is designated operator of the well and common sources of supply covered hereby and all elections must be communicated to said Operator at the address above as required in this Order.

7. That Inexco Oil Company must commence operations for the drilling or other operations with respect to the well covered hereby within 180 days from the date of this Order and diligently prosecute the same to completion in a reasonably prudent manner, or this Order shall be of no force and effect, except as to the payment of cash bonuses.

8. That Inexco Oil Company or its attorney shall file with the Secretary of the Commission, within 10 days from the date of the Order, an Affidavit stating that a copy of said Order was mailed within 3 days from the date of this Order to all parties pooled by this Order, whose addresses are known.

DONE AND PERFORMED this 6 day of June 1984.

CORPORATION COMMISSION OF OKLAHOMA

Hamp Baker, Chairman

S/Norma Eagleton
Norma Eagleton, Vice-Chairman

S/James B. Townsend
James Townsend, Commissioner

ATTEST:

S/ _____

Berdee S. Holt, Secretary

(SEAL)

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

ORDER NO. 260474

CAUSE CD NO. 108567

Applicant: Inexco Oil Company

In the matter of pooling oil and gas interests, designating applicant or some other party operator and adjudicating the rights and equities of oil and gas owners in the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

REPORT OF THE TRIAL EXAMINER

This Cause came on for hearing before Ms. Jodi B. Levine, Trial Examiner for the Corporation Commission, in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, on the 20th day of April, 1984, pursuant to notice given as required by law and the rules of the Commission, and the Trial Examiner heard said Cause and all persons present at the hearing who were interested in said Cause were given an opportunity to present testimony, either for or against the Application, and after hearing all the testimony, the Trial Examiner is of the opinion that the Application should be granted and an Order, a copy of which is attached, should be made.

That the findings in the attached Order are each and all supported by the evidence and are made a part of this Report as fully and as completely as if set out herein in full.

DATED this 5th day of June, 1984.

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Tuesday, November 29, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

64,455 INEXCO Oil Company v. Oklahoma Corporation Commission, Ward Petroleum Corporation and Nova Energy Corporation.
Petitions for rehearing denied.

* * *

S/ Doolin, C.J.
CHIEF JUSTICE

Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

APPELLEE NOVA ENERGY CORPORATION'S OPPOSITION TO MOTION TO SUMMARY DISPOSITION

INTRODUCTION

Unlike the ultimate issue in *Amoco Production Co. v. Corporation Commission,* 57 OBAJ 1961 (July 29, 1986; Okl. Ct. App.), the ultimate issue in this appeal is whether parties have the right to elect participation in an increased density well. *Amoco* does *not* deal with that issue and is not necessarily dispositive of the instant appeal for the following reasons:

I. The appeal in *Amoco* is not procedurally concluded.

II. *Amoco* and the instant appeal arise on substantially different facts.

III. Purely prospective application of *Amoco* requires this Court to determine this appeal on its own merits. This

would afford owners like Nova the right to elect participation in the increased density well after having elected not to participate in the initial well, which election was based upon notice from the Commission that the initial forced pooling order covered only the wellbore of the Wolfe #1-23 well and not increased density wells like the Albright Farms #1-23.

IV. Even retroactive application of *Amoco* would yield the same result by rendering void the wellbore scope of both the initial pooling Order No. 260474 and the increased density pooling Order No. 277146. This might compel a new forced pooling order, but in any event would call for new elections now by all parties as to the Wolfe #1-23, Albright Farms #1-23, and any other wells as might be drilled in the entire unit.

V. *Amoco's* mandate of unit-wide forced pooling in this case is unconstitutionally overbroad and causes 52 O.S. Section 87.1 to be an irrational legislative and unconnected to the stated goals of the statute.

Nova Energy Corporation (hereinafter "Nova") respectfully requests that the Motion for Summary Disposition be denied, that this Court proceed to determine this case on its merits, and that the parties herein be allowed to present oral argument to the Court in this case.

* * *

ARGUMENTS AND AUTHORITIES

* * *

Proposition II: *Amoco* and the instant appeal arise on substantially different facts.

Amoco is not dispositive of the instant appeal because the two appeals arise upon substantially different factual bases. In *Amoco,* the original force pooling order was entered *prior* to the Commission's issuance of Policy Statement 45 which declared the Commission's policy to "pool, without exception, by the wellbore." The original order entered in the instant appeal was entered *after* the issuance of Policy Statement 45. Thus, unlike the parties in *Amoco,* the Appellees in this appeal made their election under the initial order with notice and well-founded reliance that such election would only affect their rights in a single wellbore.

* * *

Proposition IV: Even retroactive application of *Amoco* would afford owners like Nova an election to participate in the increased density well Albright Farms #1-23; in order words, the same result would obtain, but upon different reasoning.

As a matter of hornbook law in Oklahoma, a lower tribunal's order will be affirmed on appeal if it reaches a correct result albeit on faulty reasoning. Appellant here challenges the Commission's Order No. 277146 because it gives owners like Nova an election to participate in the increased density well Albright Farms #1-23. Yet this very result obtains even if *Amoco* is read most broadly and retroactively. If anything then, *Amoco* would compel this Court to summarily uphold the very result challenged by Appellant.

More specifically, interpreting *Amoco* in the light most favorable to the Appellant would give retroactive application to

that decision, but would still provide all parties here with new elections, both as to the Albright Farms #1-23 and the Wolfe #1-23 wells. The logic of such result is obvious.

Assuming that *Amoco* stands for the proposition that the Commission may *never* force-pool by the wellbore, then the initial pooling Order No. 260474 here is void *ab initio,* as is the increased density Order No. 277146 now on appeal. Initial pooling Order No. 260474, *by its express language,* only adjusted the equities in the initial well drilled to the Des Moines common source of supply, the Wolfe #1-23. So too, did Policy Statement 45, issued one month prior to that order, limit its effect to one wellbore. If *Amoco* now says that such an order is outside the Commission's jurisdiction to enter, then Order No. 260474 must be declared void *ab initio,* thus rendering all elections made thereunder a nullity: one may not make a *valid* election under an *invalid* order. Because Order No. 277146 (now on appeal here) was also unquestionably a wellbore only order, it too must fall as jurisdictionally void, as will all elections made pursuant thereto. The result: The Des Moines common source of supply underlying Section 23 and the wells drilled thereto are unpooled and have been so since the day they were spud. All owners of the right to drill in that unit are simply co-tenants and must account to each other for all costs of drilling, completion and operation as well as for all proceeds of production. Any one of those co-tenants may now file an application to force pool the unit with its two existing wells and the Commission may name an operator of the unit and provide election options to each owner which will cover their rights in the entire unit, including all existing wells and any future wells, upon such terms as are just and reasonable. All parties must be returned to the same position they held prior to the entry of Order No. 260474. This is what *Amoco* mandates if read retroactively.

Contrary to Appellant's argument, Order NO. 260474 cannot simply be left in force and "re-written" to have unit-wide scope, leaving all elections intact as originally made. This would violate due process. To avoid such unconstitutionality, the parties must be restored to the position they held *prior* to electing under the initial order. Due process requires *notice* of the rights purported to be affected by application of the police power. *Carter Oil Co. v. State,* 205 Okl. 374, 238 P.2d 300 (Okl. 1951); *Carpenter v. Powel Briscoe, Inc.,* 380 P.2d 245 (Okl. 1963). The respondents to initial Order No. 260474 were given notice, as was Inexco, both by the terms of the order itself and by the issuance of Policy Statement 45, that any election which they might make would only affect their property rights in a single well. If this Court were to now re-write that initial Order to have unit-wide terms, the notice requirements of due process would be annihilated *unless* all respondents were given new election options after notice that such elections would affect their rights in the entire unit. If such notice has now come via *Amoco,* then the parties must now be afforded the right to make an *informed* election.

Inexco and its successor may argue that their "vested" rights have been taken by allowing Nova and others new elections at this late date. But *any* rights obtained under initial Order No. 260474 are subject to a vitiating infirmity in their creation because Nova and others were not notified until after the fact that a non-participation election equates to a forced sale of their entire leasehold interest. Therefore, if *Amoco* re-writes the terms of initial Order No. 260474 to now, for the first time, have unit-wide scope, due process requires that all bound parties be afforded an ejection opportunity under those new, re-written terms.

Retroactive application of *Amoco* to this and other factual situations will result in an unprecedented legal and practical quagmire. Whether retroactive application of *Amoco* requires that both pooling orders entered be vacated *ab initio,* or that terms of initial Order No. 260474 be re-written, the fact remains that all parties will now have another election opportunity, this time with constitutional 20/20 hindsight. The accounting for past costs and production will be a nightmare, even if all parties involved are still solvent.

Retroactive application of *Amoco* to the facts of this case will result in a mere Pyrrhic victory for the Appellant, because even though it may achieve the desired result of reversing subsequent Order No. 277146, it will be at the cost of allowing all parties new elections in the entire unit.

* * *

Respectfully submitted,

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By: S/_____
J. JAYNE JARNIGAN

Attorneys for Appellee
NOVA ENERGY CORPORATION

Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

APPELLEE NOVA ENERGY CORPORATION'S OPPOSITION TO SUPPLEMENTAL MOTION FOR SUMMARY DISPOSITION

STATEMENT WHY APPELLANT'S SUMMARY DISPOSITION MOTION SHOULD BE DENIED

The central issue on appeal is no longer the broad question whether the Oklahoma Corporation Commission has the authority to force pool by the wellbore—that issue has been decided in *Amoco Production Co. v. Corporation Commission,* 57 OBAJ 1961 (July 29, 1986; Okl. Ct. App.), as modified at 59 OBAJ 718 (December 16, 1978; Okl. Sup. Ct.) and in *Ranola Oil Co. v. Corporation Commission,* 59 OBAJ 847 (March 22, 1988; Okl. Sup. Ct.). Instead, the issue which now faces this Court is what effect *Amoco* and *Ranola* have on the peculiar

facts of this case, since the unit-pooling rule announced in those cases is prospective only.

* * *

Third, unlike the non-participation bonuses in *Amoco* and *Ranola,* the non-participation bonus fixed by previous Order No. 260474 was based on *wellbore,* not leasehold values. Therefore, when Ward and Nova's predecessor elected not to participate in the Wolfe well, Inexco paid them only for their working interest in that single wellbore. Unlike the operators in *Amoco* and *Ranola,* operator Inexco here obtained rights far less than the leasehold interests of parties like Ward and Nova. Neither Inexco (nor LL&E) will be unfairly deprived of any property interest whatsoever by reason of either the wellbore scope of Order No. 260474 or the giving of a participation election to parties like Ward and Nova in the Albright and subsequent unit wells.

Fourth, even if this Court determines that the wellbore scope of previous Order No. 260474 along with Order No. 277146, so as to leave the entire unit unpooled, ready for a proper forced-pooling order to be entered on a unit-wide basis. This would necessarily afford all parties *de novo* elections to participate as though no earlier elections had been made. Simply re-writing Order No. 260474, as LL&E urges, to have unit scope in the teeth of its plain wellbore scope would not only violate the due process rights of parties like Ward and Nova, but would constitute an impermissible collateral attack upon now-final and never-appealed Order No. 260474.

Were Order No. 260474 to fall as void *ab initio,* due process requires that all parties once bound by such Order be given new

elections in the entire drilling and spacing unit, including all existing and subsequent wells. All parties elected under Order No. 260474 with notice that a non-participation election would only transfer the working interest in a single wellbore. To now rewrite the scope of Order No. 260474 after elections were made would violate both substantive and procedural due process. This is especially so since, unlike *Amoco* and *Ranola,* the non-participation bonus in Order No. 260474 rested upon *wellbore,* not upon leasehold values.

ARGUMENTS AND AUTHORITIES

Proposition I: ***Amoco's* prospective-only rule mandates that Nova and Ward be afforded an election to participate in the Albright and future unit wells, even though such parties elected not to participate in the earlier Wolfe well.**

* * *

The language used in Order No. 260474 is a clear reflection of the Commission's intent to pool interests only on a wellbore by wellbore basis. Such intent was published in the Commission's Policy Statement No. 45 *prior* to the entry of Order No. 260474. It would be entirely inconsistent to hold now that Order No. 260474, a post-Policy Statement order, affected more than wellbore interests.

Further, the evidence in the record on this appeal strongly suggests that the bonuses established for non-participating parties were based upon *wellbore* values, not on leasehold values. Order No. 260474 set a cash bonus of $1250.00 per acre with an excess royalty of 1/16th. The only lease transaction involving

Section 23 was the transaction between Vierson Oil and Gas Company and Nova. *Record,* pp. 43-44. In that arms-length transaction, Nova acquired an oil and gas lease giving it the right to drill more than one well in Section 23 by paying Vierson Oil and Gas Company $2700 per acre cash bonus, a 3/16ths royalty and an option to back-in. *Record,* pp. 44 and 81. Clearly, the drilling of the marginal Wolfe well would not have driven *leasehold* cash bonus up by more than 100% in the nine months ensuing between the entry of Order No. 260474 and the date of the Nova lease from Vierson Oil and Gas Company. *Record,* p. 93. Thus, since the cash bonus set in Order No. 260474 was less than one-half of the value established in an arms-length multi-well lease transaction, it plainly follows that the Commission intended for Inexco, by payment of bonus under that Order, to acquire less rights than Inexco would have through a multi-well lease.[1]

* * *

[1] The Court should also note that in a prior pooling on the immediate East offset to Section 23, when the Vierson/Nova transaction was presented, the Commission determined that same was not representative of fair market value for a *wellbore* interest, and therefore established $1500 per acre with a 3/16ths royalty as the fair market value for force pooled interests in that section. *Record,* pp. 44-45. This evidence also reflects that the value for force polled interests established under Order No. 260474 was wellbore, not leasehold value.

Proposition II: Even if the new unit-pooling rule of *Amoco* and *Ranola* somehow reaches previous Order No. 260474, the correct remedy is complete vacatur of both orders (No. 277146 *and* No. 260474), thereby restoring all parties to their pre-election positions and affording them *no dovo* elections for the entire unit (Wolfe and Albright wells included).

If this Court determines that the previously-final Order No. 260474 cannot stand in light of the new unit-pooling rule, then the proper remedy is complete vacatur of that Order as void *ab initio*. To re-write that Order retroactively, as LL&F urges, would violate due process. Instead, due process requires that all parties affected by such fallen Order be returned to the status which they held prior to making elections under that Order. In such event, all parties would again be afforded participation elections on remand, but this time their elections would be binding on the unit as a whole, with the Wolfe and Albright wells included.

Due process requires *notice* of the rights purported to be affected by the exercise of the police power. *Carter Oil Co. v. State*, 205 Okl. 374, 238 P.2d 300 (1951); *Carpenter v. Powel Briscoe, Inc.*, 380 P.2d 245 (Okl. 1963).

> "Notice is a jurisdictional requirement as well as a fundamental element of due process. Due process requires *adequate* notice, a realistic opportunity to appear at a hearing or judicial sale, and the *right to participate in a meaningful manner before one's rights are irretrievably altered. The right to be heard is of little value unless adequate notice is given.* Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of the action, and *lack*

of notice constitutes a jurisdictional infirmity." (Emphasis added.)

Cate v. Archon Oil Co., Inc., 695 P.2d 1352, 1356 (Okl. 1985).

The respondents to *and the applicant in* Order No. 260474 were notified by the terms of that Order, and by the Commission's published Policy Statement, that a non-participation election would only affect rights in and to a particular wellbore—to now re-write Order No. 260474 as compelling transfer of rights in the *entire unit* would be to irretrievably alter Nova's property rights without affording Nova *any* notice of the extent of the rights altered. The total lack of notice of the rights purported to be affected by Order No. 260474 may be precisely what this Court referred to in *Crest Resources and Exploration Corp. v. Corporation Commission,* 617 P.2d 215 (Okl. 1980) when it said that rights under a pooling order, once vested, are no longer vulnerable to extinquishment[sic] "absent some vitiating infirmity in their creation." 617 P.2d at 218. While LL&E cries that its "vested" property rights have been taken by allowing Nova to participate in the Albright well, it is plain that any rights which LL&E's predecessor may have obtained under Order No. 260474 are subject to a vitiating infirmity in their creation since Nova's predecessor and other respondents to that Order were not given *notice* that if they elected not to participate, they were in fact selling their entire leasehold unit.

Further, both our state and federal constitutions prevent state authority from depriving an individual of property without just compensation. Okl. Const. Art. II, Section 7 and U.S.C.A. Const. Amend. 14, Section 1; *Ricks Exploration Co. v. Oklahoma Water Resources Board,* 695 P.2d 498 (Okla. 1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980) This Court has previously held that just compensation

for forced pooled interests must be based upon fair market value. *North American Royalties, Inc. v. Corporation Commission,* 683 P.2d 539 (Okl.App. 1984). Fair market value is defined as

> "the level at which this interest can be sold, on open-market negotiations, by one willing, but not obliged, to sell to a buyer willing, but not obliged, to buy."

Miller v. Corporation Commission, 635 P.2d 1006, 1008 (Okl. 1981). If Order No. 260474 is to now be re-written to transfer the full leasehold rights of parties electing not to participate, Nova's property will have been taken without just compensation insofar as the values established in that Order were not *leasehold* values.

Under the peculiar facts of this case, *if* Order No. 260474 is now to be re-written to have unit-wide scope so that non-participation elections thereunder are to transfer the entire leasehold interest of the non-participating party, then *all* parties affected by Order No. 260474 must be returned to their pre-election status and afforded an opportunity to make an *informed* election under that Order. To do less would be an egregious violation of state and federal due process.[2]

---

[2] As fully set forth in Nova's Opposition to the original Motion for Summary Disposition (filed December 11, 1987), applying cases like *Amoco* and *Ranola* to always require unit-wide forced pooling (as LL&E now urges) would cause the new unit-pooling rule to be unconstitutionally overbroad and would cause 52 O.S. Section 87.1(e) to become an irrational legislative act unconnected to the stated goals of the statute. *See* Nova's Opposition to Motion for Summary Disposition at pp. 11-16.

* * *

Respectfully submitted,

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By:S/_____
J. Jayne Jarnigan

William C. Anderson (OBA 292)
Albert J. Givray (OBA 3397)

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Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

APPELLEE NOVA ENERGY CORPORATION'S PETITION FOR REHEARING COMBINED WITH BRIEF IN SUPPORT

STATEMENT WHY REHEARING SHOULD BE GRANTED

This Court's July 6, 1988 Opinion shows that the Court viewed this case to be just another run of the mill "unit versus wellbore pooling" appeal. It is not.

The central issue in this appeal is not the broad question of whether the Oklahoma Corporation Commission has the authority to force pool by the wellbore—that issue has been decided in *Amoco Production Co. v. Corporation Commission*, 57 O.B.J. 1961 (Okla. Ct. App. July 29, 1986), as modified at 59 O.B.J. 718 (Okla. Sup. Ct. Dec. 16, 1987) (hereafter *Amoco I*) and in *Ranola Oil Co. v. Corporation Commission*, 59 O.B.J. 847 (Okla. Sup. Ct. Mar. 22, 1988). Instead, the critical

issue before this Court is what remedy *Amoco I, Ranola,* and their prospective-only holdings afford Nova Energy and Ward Petroleum under the peculiar facts of this case, once it is concluded that the wellbore scope of Order No. 277146 cannot stand. Nova respectfully submits that this Court resolved entirely the wrong issue in its Opinion, and worse, decided the wrong issue on a critically mistaken view of key facts which distinguish this case from other unit-versus-wellbore appeals.

* * *

To repeat, this Court's Opinion has resolved the wrong issue on a grievously mistaken view of key undisputed facts. Such Opinion therefore disregards the prospective-only effect of *Amoco I* and guts Nova's constitutional rights. A rehearing should be granted to avoid grave injustice to parties like Nova and Ward, who made participation elections under clearly established law which *Amoco I* has only recently changed. Under a correct view of the peculiar record in this case, both *Amoco I* and *Ranola* compel a modification of this Court's Opinion on rehearing because:

* * *

Third, unlike the non-participation bonuses in *Amoco I* and *Ranola,* the non-participation bonus fixed by previous Order No. 260474 was based on *wellbore,* not leasehold values. Therefore, when Ward and Nova's predecessor elected not to participate in the Wolfe well, Inexco Oil Company (hereinafter "Inexco") paid them only for their working interest in that single wellbore. Unlike the operators in *Amoco I* and *Ranola,* operator Inexco here obtained rights far less than the leasehold interests of parties like Ward and Nova. Neither Inexco (nor its successor in interest Louisiana Land and Exploration Company,

hereinafter "LL&F") will be unfairly deprived of any property interest whatsoever by reason of either the wellbore scope of Order No. 260474 or the giving of a participation election to parties like Ward and Nova in the Albright and subsequent unit wells.

Fourth, even if this Court still decides that the wellbore scope of previous Order No. 260474 cannot stand in light of *Amoco I* and *Ranola,* the proper remedy is to vacate Order No. 260474 along with Order No. 277146, so as to leave the entire unit unpooled, ready for a proper forced-pooling order to be entered hereafter on a unit-wide basis. This would necessarily afford all parties *de novo* elections to participate as though no earlier elections had been made. Simply rewriting Order No. 260474, as this Court has done, to have unit scope in the teeth of the plainly intended wellbore scope, not only violates the due process rights of parties like Ward and Nova, but also constitutes an impermissible collateral attack upon now-final and never-appealed Order No. 260474.

Were Order No. 260474 to fall as void *ab initio,* due process requires that all parties once bound by such Order be given new elections in the entire drilling and spacing unit, including all existing and subsequent wells. All parties elected under Order No. 260474 with notice that a non-participation election would transfer the working interest in only a single wellbore. By now re-writing the scope of Order No. 260474 after elections were made, substantive and procedural due process are violated. This is especially so since, unlike *Amoco I* and *Ranola,* the non-participation bonus in Order No. 260474 rested upon *wellbore,* not upon leasehold values.

* * *

The Commission's later Order No. 277146 (now on appeal) did not re-pool anything. The later order simply reaffirmed the intended wellbore scope of the earlier order. Even if the Commission acted wrongly in doing all this, the reliance of parties like Nova and Ward cannot be summarily disregarded. Such reliance was reasonable and caused these parties to surrender valuable rights in subsequent wells like the increased density Albright well. Therefore, if the forced pooling is to have a unit-wide scope for the first time now on appeal, parties like Nova and Ward must be given another election to participate in the entire unit. *This unit-wide election has never been given to Nova or Ward.*

* * *

Proposition II: Even if the new unit-pooling rule of *Amoco I* and *Ranola* somehow reaches previous order No. 260474, the correct remedy is complete vacatur of both orders (No. 277146 *and* No. 260474), thereby restoring all parties to their pre-election positions and affording them *de novo* elections for the entire unit (Wolfe and Albright wells incluced).

If this Court decides on rehearing that previously-final Order NO. 260474 cannot stand in light of the new unit-pooling rule, then the proper remedy is complete vacatur of that Order as void *ab initio,* not re-writing that Order to have unit-wide scope after the fact. To re-write that Order retroactively, as this Court has done, violates due process.

Due process requires that all parties affected by such fallen Order be returned to the status which they held prior to making elections under that Order. In such event, all parties would again be afforded participation elections on remand, but this

time their elections would be binding on the unit as a whole, with the Wolfe and Albright wells included.

Due process requires *notice* of the rights purported to be affected by the exercise of the police power. *Carter Oil Co. v. State,* 205 Okl. 374, 238 P.2d 300 (1951); *Carpenter v. Powel Briscoe, Inc.,* 380 P.2d 245 (Okl. 1963).

> "Notice is a jurisdictional requirement as well as a fundamental element of due process. Due process requires *adequate* notice, a realistic opportunity to appear at a hearing or judicial sale, and the *right to participate in a meaningful manner before one's rights are irretrievably altered. The right to be heard is of little value unless adequate notice is given.* Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of the action, and *lack of notice constitutes jurisdictional infirmity.*" (Emphasis added.)

Cate v. Archon Oil Co., Inc., 695 P.2d 1352 (Okl. 1985).

The respondents to *and the applicant in* Order NO. 260474 were notified by the terms of that Order, and by the Commission's published Policy Statement, that a non-participation election would only affect rights in and to a particular wellbore—this Court's *ex poste facto* reconstruction of Order No. 260474 as compelling transfer of rights in the *entire unit* irretrievably alters Nova's property rights without affording Nova *any* notice of the extent of the right altered. The total lack of notice of the rights purported to be affected by Order No. 260474 is a vitiating infirmity in that Order which allows the Commission to repool the unit both under this Court's Opinion herein and under *Crest Resources and Exploration Corp. v. Corporation Commission,* 617 P.2d 215 (Okl. 1980). While this Court has opined that Inexco's "vested" property rights have

been taken by allowing Nova to participate in the Albright well, it is plain that when *all* of the facts of this case are considered, any rights which LL&E's predecessor may have obtained under Order No. 260474 are subject to a vitiating infirmity in their creation since Nova's predecessor and other respondents to that Order were not given *notice* that if they elected not to participate, they were in fact selling their entire leasehold in the unit. Thus, this Court's own analysis in its July 6, 1988 Opinion results in an alternative which Nova has requested complete vacatur of Order No. 260474 so that the unit is *unpooled,* thus restoring all parties to their status *prior* to electing under Order No. 260474, and allowing them *de novo* elections for the entire unit, Wolfe and Albright wells included.

Further, both our state and federal constitutions prevent state authority from depriving an individual of property without just compensation. Okl. Const. Art. II, Section 7 and U.S.C.A. Const. Amend. 14, Section 1; *Ricks Exploration Co. v. Oklahoma Water Resources Board,* 695 P.2d 498 (Okl. 1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980). This Court has previously held that just compensation for forced pooled interests must be based upon fair market value. *North American Royalties, Inc. v. Corporation Commission,* 683 P.2d 539 (Okl.App. 1984). Fair market value is defined as

> "the level at which this interest can be sold, on open-market negotiations, by one willing, but not obliged, to sell to a buyer willing, but not obliged, to buy."

Miller v. Corporation Commission, 635 P.2d 1006, 1008 (Okl. 1981). This Court's mistaken re-writing of Order No. 260474 so as to transfer the full leasehold rights of parties electing not to participate, takes Nova's property without just compensation insofar as the values established in that Order were not

leasehold values.

Under the peculiar facts of this case, *if* this Court is going to re-write Order No. 260474 to have unit-wide scope so that non-participation elections thereunder are to transfer the entire leasehold interest of a non-participating party, then this Court must also hold that *all* parties affected by Order No. 260474 be returned to their pre-election status and afforded an opportunity to make an *informed* election under that Order. To do less would be an egregious violation of state and federal due process.[4]

* * *

Respectfully submitted,

Gregory L. Mahaffey (OBA 5626)
J. Jayne Jarnigan (OBA 10357)

By:S/_____
Gregory L. Mahaffey

William C. Anderson (OBA 292)
Albert J. Givray (OBA 3397)

By:S/_____
William C. Anderson

[4] As fully set forth in Nova's Opposition to the original Motion for Summary Disposition (filed December 11, 1987), applying cases like *Amoco I* and *Ranola* to always require unit-wide forced pooling would cause the new unit-pooling rule to be unconstitutionally overbroad and would cause 52 O.S. Section 87.1(e) to become an irrational legislative act unconnected to the stated goals of the statute. *See* Nova's Opposition to Motion for Summary Disposition at pp. 11-16.

Case No. 64455

IN THE
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INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

REPLY BRIEF OF NOVA ENERGY CORPORATION ON REHEARING (PURSUANT TO ORDER OF THIS COURT)

Proposition

Inexco's response to Nova's rehearing petition overlooks the unique circumstances here which mandate that Nova be afforded an election to participate on a unit-wide basis.

To repeat the thrust of NOVA's rehearing request, no party to Order No. 260474 has *ever* been afforded an election to participate in the *entire unit.* The August 1988 Response Brief of The Louisiana Land And Exploration Company, successor by merger and acquisition to Inexco Oil Company (hereinafter "INEXCO"), fails to address this fundamental issue.

* * *

Further, as fully set forth in the Rehearing Petition, to apply *Amoco I* as INEXCO requests would violate NOVA's constitutional right to due process. As previously stated, no party to Order No. 260474 has ever been given the right to elect on a unit-wide basis (due to the unquestionable wellbore scope provided to that Order).

> "Notice is a jurisdictional requirement as well as a fundamental element of due process. Due process requires adequate notice, a realistic opportunity to appear at a hearing or judicial sale, and the right to participate in a meaningful manner before one's rights are irretrievably altered. The right to be heard is of little value unless adequate notice is given. Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action, and lack of notice constitutes a jurisdictional infirmity.[1]

INEXCO's August 1988 Brief fails to address this fundamental issue, other than to assert that it was not properly preserved.

The record is devoid of any evidence which would support the assertion that the respondents to Order No. 260474 were given *any* notice that an election thereunder would affect rights in the *entire unit*. The recognition by this Court in *Amoco I* that the unit-pooling rule is new law, not clearly foreshadowed, also lends support to the argument that the respondents to Order No. 260474 could not have anticipated that their elections would be deemed to cover more than the Wolfe wellbore. Because jurisdiction is a primary and fundamental issue in each case, whether or not raised by the parties, this Court must

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[1] Cate v. Archon Oil Co., Inc., 695 P.2d 1352, 1356 (Okl. 1985).

always review the notice issue.[2] Since the record overwhelmingly reflects that neither NOVA's predecessor nor any other respondent was adequately notified that Order No. 260474 would affect their rights in the *entire unit,* the Commission was without jurisdiction to enter a unit-wide order and this Court should not through appellate fiat rewrite the scope of Order No. 260474.

* * *

Respectfully submitted,

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[2] *Id.*

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Appellees

RESPONSE OF WARD PETROLEUM CORPORATION TO THE MOTION FOR SUMMARY DISPOSITION BY INEXCO OIL COMPANY

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* * *

17. (a) In *Amoco,* the Court ruled that it was unfair and a violation of substantive due process to alter the position of the parties after the initial well was drilled and certain rights had vested.

(b) In the instant case, it would be unfair to Ward to alter the position of the parties after the initial well was drilled by *creating* certain rights in INEXCO which INEXCO did not have after the initial pooling order. The second pooling order should not give to INEXCO rights under the initial order which were never created by the initial order. Such a post-order

alteration of rights would extinguish Ward's vested right to participate in the second well and would violate substantive due process. As the Court stated in *AMOCO:*

"The original election is based upon certain information, or lack of information. Good faith elections were made prior to the first well. It is not fair or just to alter the positions of the interest owners after the initial well is drilled." (at 1963)

Ward's made a good faith election based upon: (a) Ward's desire to drill at a location different than the one selected by INEXCO for the initial well; (b) the language of the initial order which pooled only a single well; and, (c) the OCC Statement of Policy which limited the intended effect of the initial well to a single wellbore.

* * *

Respectfully submitted,

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Case No. 64455

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OKLAHOMA CORPORATION COMMISSION,
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and NOVA ENERGY CORPORATION
Appellees

BRIEF OF WARD PETROLEUM CORPORATION IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION AND IN RESPONSE TO SUPPLEMENTAL MOTION FOR SUMMARY DISPOSITION BY LOUISIANA LAND AND EXPLORATION COMPANY

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* * *

III. **Order No. 1 Was A Pooling By The Well, Not the Unit**

* * *

Because Order No. 1 is a pooling by the *well,* it grants rights as to *one* well only. Order No. 2 is a *new* pooling and grants rights to a *new* well. It does not disturb the rights or interests of Inexco in the one well.

If Order No. 2 were changed to grant rights to Inexco in *more* than one well, that would be a collateral attack upon

Order No. 1 because the change would defeat the effect of Order No. 1. As it is, Order No.2 does not seek to modify or alter Order No. 1 in any way. Order No. 2 simply recognizes that Order No. 1 made Inexco operator of the well only and pooled interests of the owners as to the well only.

* * *

By now claiming that Inexco should be declared operator of the *unit* under Order No. 1, LL&E is seeking to modify Order No. 1. *That* is a collateral attack. Because Order No. 1 applied to a single well, Ward kept the right to participate in future wells. LL&E is trying to take away that right by having this Court interpret Order No. 1 in such a way that is contrary to the language of the Order; contrary to the intent of the Commission; contrary to the Commission's policy and contrary to the understanding of the owners who relied upon the order and policy of the Commission. This is a collateral attack and a deprivation of property without due process.

* * *

Respectfully submitted,

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Appellees

BRIEF IN SUPPORT OF WARD PETROLEUM CORPORATION'S PETITION FOR REHEARING

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* * *

B. **Under The Griggs Test, Amoco Should Not Apply Retroactively To Order No. 260474**

Retroactive application of *Amoco* would unfairly deprive Ward of *its* property rights. Under Order No. 260474, Ward gave up only its right to participate in the Wolfe Well, out of its "bundle of rights" Ward retained in its bundle of rights, the right to participate in future wells. This is especially unfair since Inexco was aware of the limited rights it obtained under Order No. 260474, yet it failed to appeal that Order.

* * *

VI. **If the *Amoco* rule applies to order No. 260474, then that order is void**

If this court holds that *Amoco* applies to Order No. 270474 [sic] then that order is void. Ward did not have proper notice that Order No. 260474 was unit-wide pooling. Therefore, Ward was unaware that by electing *not* to participate, it was giving up the right to participate in future wells. This failure of notice is a denial of due process.[1] Therefore, Order No. 260474 would be void if *Amoco* applies.

* * *

Appellees respectfully submit, it is not within the authority of this court to rewrite Order No. 260474. If the Commission was wrong to construe Order 260474 as a well-bore pooling, it can only be wrong because Order No. 260474 is void. If Order 260474 is void, this Court may not alter or modify it. A void order is like a shattered chicken egg. The shattered egg cannot be put back together and it certainly cannot be put back together as a goose egg.

* * *

Respectfully submitted,

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[1] *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 73 P.2d 438 (Okl. 1986).

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Appellees

WARD PETROLEUM CORPORATION'S BRIEF IN REPLY TO LOUISIANA LAND AND EXPLORATION COMPANY'S RESPONSE TO PETITION FOR REHEARING

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* * *

II. Introduction

This case must begin with the understanding that every oil and gas lease owner, by purchasing an oil and gas lease, obtains certain rights on the lands covered by the lease. The mineral owner conveys those rights to the lease owner when he executes the oil and gas lease. At that point, a bundle of rights is vested in the lease owner. Among those rights is the right to drill not one but *all* oil and gas wells that may be drilled on those lands.

The Commission, empowered by the State of Oklahoma to prevent waste and protect correlative rights, has the authority to

restrict or limit the rights of the lease owner. Until the Commission acts to limit or restrict those rights, the lease owner retains his entire bundle of rights vested in him by the oil and gas lease.

If one imagines the lease owners' right to drill several wells as a bundle of sticks, then each stick would represent the right to drill a single well. When the Commission issues a pooling order by the unit, the Commission is in effect taking the entire bundle of sticks from the lease owner and handing them to the designated operator. The designated operator, now holding the entire bundle of sticks, holds rights of all lease owners to drill *all* wells. The Commission has the authority to transfer these bundles of sticks from the lease owner to the operator.

When the Commission issued a pooling order by the wellbore, the Commission in effect took only a single stick from the lease owners' bundle of sticks and handed a single stick to the operator. The designated operator, holding only the single stick, held only the right to drill a single well. The lease owners retained their bundle of sticks, less one, and therefore retained the right to drill all wells, except one. The Commission, until the ruling in *Amoco,*[1] believed it had the authority to transfer from the lease owner to the operator either: (a) the entire bundle of sticks, or (b) only a single stick.

When the Commission issues an order, the lease owner must know whether only a single stick has been taken from him or whether his entire bundle has been taken. With this knowledge, the lease owner may act accordingly either by appeal of the Commission order or by subsequent business decisions.

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[1] *Amoco Production Company v. Corporation Commission, 751 P.2d 203 (Okl. App. 1986).*

In this case, the Commission, Ward and INEXCO knew when it was issued that Order No. 260474 contemplated the transfer of a single stick from Ward, the non-operator, to INEXCO, the operator. INEXCO could have appealed the Order. If INEXCO had appealed, this court could have *then* told Ward, INEXCO, and the Oklahoma Corporation Commission that pooling can only be by the unit. Thereafter, Ward could decide whether to participate under a unit order knowing that failure to participate would mean giving up its entire bundle of sticks. But INEXCO did not appeal and after Order No. 260474 became final, Ward had no way of knowing that failure to participate would mean giving up its entire bundle of sticks. As the Court's decision stands, Ward will be deprived of its bundle of sticks without due process of law. One of those lost sticks is worth several million dollars.

* * *

VII. *Amoco* should not apply retroactively to Order No. 260474

In *Amoco,* this court ruled 52 O.S. § 87.1 authorized pooling by the unit only. However, the ruling in *Amoco* was to be given effect only in: (a) *Amoco;* and (b) prospectively in, "all matters where the order of the corporation Commission in question has not become final as of the date of mandate in this case."

It would seem clear that since Order No. 260474 was final and unappealable for more than two years prior to *Amoco, Amoco* should not apply to Order No. 260474. However, LL&E has a very different understanding of *Amoco's* prospective effect. LL&E interprets *Amoco* and *Ranola* to mean all initial pooling orders entered by the Commission must be construed as unit orders, even those final and unappealable prior to *Amoco's*

mandate. However, as to any *subsequent* pooling orders which are final and unappealable, *those* pooling orders may be by the wellbore.

* * *

Neither *Amoco* nor *Ranola* converted a wellbore order which was final and unappealable into a unit order. In both cases, the rights vested under the initial order were retained on appeal. In this case, the court has converted a wellbore order into a unit order and the rights vested under the initial order have been altered on the appeal of a subsequent order, long after the initial order was final and unappealable.

* * *

IX. Conclusion

* * *

Shall the rule of *Amoco* apply to Order No. 260474? If *Amoco* does not apply to Order No. 260474, then the order may stand as a wellbore pooling and Order No. 277146 should be affirmed.

If *Amoco* does apply, the third issue comes into play. Shall Order No. 260474 be rendered void or may the Order be modified to make it a pooling by the unit? If the court makes *Amoco* retroactive then Order No. 260474 must be void. The Court cannot *change* Order No. 260474 from wellbore to unit pooling without taking Ward's property rights without due process and without violating the rule prohibiting collateral attack upon a voidable order. If the Order is determined to be void, then the two wells in this case and countless other wells across the state will be without pooling orders. This court should not allow that to happen.

* * *

Respectfully submitted,

STACK & BARNES, P.C.

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ATTORNEYS FOR WARD
PETROLEUM CORPORATION

Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

PETITION OF APPELLEES, GREENLEAF ENERGY CORPORATION, THOMAS G. WYGANT, DAVID M. PULLING and JAMES E. KUHLMAN FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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* * *

VI. Proposition IV: If the unit-wide pooling standard mandated by *Amoco* applies retroactively to order No. 260474, then Order No. 260474 must be vacated.

For the reasons discussed above, Appellees contend that the unit-wide forced pooling standard mandated by *Amoco* cannot be applied retroactively to Order No. 260474. Indeed, the holding of this Court in its Order on Certiorari in *Amoco* dated

December 16, 1987, indicates that the unit-wide pooling standard shall not be applied retroactively to Order No. 260474. Nevertheless, if this Court determines that Order No. 260474 cannot validly stand as issued, then Order No. 260474 must be vacated. Order No. 260474 cannot simply be rewritten retroactively so as to have unit-wide effect.

Due process requires that owners of property be given notice reasonably calculated to apprise them of an adjudicative proceeding which substantially affects their constitutionally protected property interests.[30] In the instant case, Appellees were notified by Policy Statement No. 45 and the express terms of Order No. 260474 that respondents electing not to participate in the drilling of the Wolfe No. 1-23 Well would relinquish to INEXCO only their rights in and to the proposed well. Appellees were never notified that their failure to participate in the drilling of the Wolfe No. 1-23 Well would result in the relinquishment of all rights in the entirety of the unit.

To rewrite Order No. 260474 retroactively to provide that the non-participating respondents thereunder relinquished to INEXCO all of their rights in the entirety of the unit would substantially affect Appellees' property interests without affording them any notice whatsoever. Accordingly, if it is determined by the Court that the COMMISSION was without jurisdiction to issue Order No. 260474 (which order expressly provides that non-participating respondents thereunder shall relinquish their rights only in and to the proposed well), and that said Order may not remain effective as issued, then Order No. 260474 must be vacated. The Order may not be rewritten

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[30]*Carlile v. Cotton Petroleum Corp.*, 732 P.23 438 (Okla. 1986).

retroactively so as to give it unit-wide effect. To do so would violate the due process clause of the Constitution of the United States and the State of Oklahoma.

* * *

Respectfully submitted,

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Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

REPLY BRIEF OF APPELLEES, GREENLEAF ENERGY CORPORATION, THOMAS G. WYGANT, DAVID M. PULLING, AND JAMES E. KUHLMAN, TO THE RESPONSE OF LOUISIANA LAND AND EXPLORATION COMPANY TO APPELLEES' PETITION FOR REHEARING

I. Introduction and summary of the positions of the parties:

* * *

GREENLEAF finally asserts that if it is determined that the *Amoco* unit-wide forced pooling shall be applied retroactively to Order No. 260474, then Order No. 260474 must be vacated. There exists no legal basis upon which to rewrite the terms of Order No. 260474 retroactively, and transform the Order into one with unit-wide effect. To do so would violate the due process clauses of the Constitutions of the United States and the State of Oklahoma.

* * *

II. Proposition I: All evidence in this matter demonstrates that the commission intended Order No. 260474 to have only wellbore scope.

GREENLEAF does not assert that on June 6, 1988, the Commission had jurisdiction or authority to issue forced pooling orders with only wellbore scope. That issue was decided by this Court in *Amoco*. Rather, GREENLEAF asserts that all evidence in the record in this matter demonstrates that notwithstanding its lack of authority to do so, the Commission provided in Order No. 260474 that a respondent electing not to participate in the drilling of the well proposed thereunder shall relinquish to the applicant only its rights in and to said well.

On May 3, 1984, approximately one month prior to the issuance of Order No. 260474, the Commission issued its Policy Statement No. 45. In Policy Statement No. 45 the Commission declared that all Commission forced pooling orders, without exception, shall determine the rights and equities of the oil and gas owners only in the wellbore of the proposed well, rather than determining the rights and equities of the oil and gas owners in the entire drilling and spacing unit. Accordingly, prior to the issuance of Order No. 260474, Policy Statement No. 45 provided all parties to the proceeding with notice that the order issued therein was limited in scope to the wellbore of the proposed well.

* * *

III. Proposition II Order No. 260474 cannot be rewritten or retroactively transformed so as to give it unit-wide effect.

* * *

Due process requires that owners be given notice reasonably calculated to apprise them of an adjudicative proceeding which substantially affects their constitutionally protected property interests.[10] In the instant case, GREENLEAF and the other respondents to the proceeding which resulted in the issuance of Order No. 260474 were notified by Policy Statement No. 45 that Commission forced pooling orders, without exception, adjudicate only the rights and equities in and to the wellbore of the well proposed thereunder. Moreover, by the express terms of Order No. 260474 they were notified that if they elected not to participate in the drilling of the proposed well thereunder, they would relinquish to the applicant all of their right, title and interest in and to said well. GREENLEAF was never notified that its failure to participate in the drilling of the Wolfe No. 1-23 Well would result in the relinquishment of all rights in the entirety of the unit.

To rewrite Order No. 260474 retroactively to provide that the non-participating respondents thereunder relinquished to INEXCO all of their rights in the entirety of the unit would substantially affect GREENLEAF'S property interests without affording it any notice whatsoever. The Order therefore may not be rewritten so as to give it unit-wide effect. To do so would violate the due process clauses of the Constitutions of the United States and the State of Oklahoma.

* * *

[10] *Carlile v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla. 1986).

Respectfully submitted,

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Case No. 64455

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INEXCO OIL COMPANY
Appellant

v.

OKLAHOMA CORPORATION COMMISSION,
WARD PETROLEUM CORPORATION,
and NOVA ENERGY CORPORATION
Appellees

ANSWER BRIEF OF APPELLEES, GREENLEAF ENERGY CORPORATION, THOMAS G. WYGANT, DAVID M. PULLING AND JAMES E. KUHLMAN

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* * *

Implicit in the findings contained in Order No. 277146 is that the oil and gas owners electing under Order No. 260474 not to participate in the drilling of the INEXCO Wolfe No. 1-23 Well are nonetheless entitled to participate in drilling of the additional well authorized by the COMMISSION in Section 23. Appellant, assuming the correctness of its contention that any forced pooling order as a matter of law, and Order No. 260474 by its express terms, fixes the rights of all owners in a drilling and spacing unit such that an owner who elects thereunder not to participate in the drilling of a well relinquishes his rights not only in the proposed well, but all rights in and to the drilling and

spacing unit, asserts that Order No. 277146 constitutes a collateral attack upon Order No. 260474.[1]

A collateral attack upon final orders of the COMMISSION is prohibited. 52 O.S. (1981) §111 reads in relevant part as follows:

> No collateral attack shall be allowed upon orders, rules and regulations of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the Supreme Court. On appeal every such order, rule or regulation shall be regarded as prima facie, valid, reasonable and just. No court of this State except the Supreme Court, and it only on appeal, as herein provided, shall have jurisdiction to review, reverse, annul, modify or correct any order, rule, or regulation of the Commission within the general scope of its authority herein . . .[2]

52 O.S. (1981) §111 is merely a codification of the common law rule prohibiting a collateral attack upon final judgments of a court.[3] The rule is based upon the public interest in the final adjudication of controversies and the conclusiveness which the law extends to judgments. This policy is especially important with regard to property rights acquired pursuant to a judgment. In effect, the rule provides that if a litigant fails to attack a judgment directly, for example by appeal, the litigant waives his right to challenge the judgment, and cannot subsequently attempt to set aside the effect of the judgment, or avoid its operation in a collateral proceeding.

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[1] Appellant's Brief in Chief, pp. 25-30.

[2] 52 O.S. (1981) §111.

[3] *Welch v. Focht*, 171 P. 730 (Okla. 1918).

Proposition IV: Appellant's position and the determination sought by the appellant herein constitutes a prohibited collateral attack upon commission order 260474.

As discussed above, Order No. 260474 clearly provides that an oil and gas owner electing not to participate in the drilling of the proposed well thereunder, relinquished to INEXCO only its rights in and to said well. Notwithstanding the clear language of Order No. 260474, Appellant chose not to appeal said order. The time for appeal of the order has long since expired and said order is now final.[4]

Appellant seeks a determination in the matter now before the Court that notwithstanding the clear language of Order No. 260474, said order fixed the rights of all oil and gas owners in the Des Moines common source of supply underlying Section 23 such that an owner electing not to participate in the well proposed thereunder relinquished not only his rights in and to the proposed well, but all of his rights in and to the drilling and spacing unit in which the well is located. The determination sought by the Appellant in this matter would avoid, defeat, evade and deny the force and effect of the clear, unambiguous language of Order No. 260474. Such a determination would constitute a collateral attack upon Order No. 260474 in violation of 52 O.S. (1981) §111. Having failed to appeal Order No. 260474, Appellant cannot attempt to avoid the operation of said order in the instant matter.

* * *

[4] *Board of County Commissioners v. Litton*, 315 P.2d 239 (Okla. 1957).

Respectfully submitted,

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BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

CAUSE C.D. NO. 122874

Applicant: Ward Petroleum Corporation

In the matter of adjudicating the rights and equities of oil and gas owners and designating the applicant or some other party as operator for the Tonkawa, Cottage Grove, Marchand, Cleveland, Des Moines, Atoka, Morrow and Springer common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

CAUSE C.D. NO. 123461

Applicant: Inexco Oil Company

In the matter of pooling oil and gas interests, designating applicant or some other party as operator, and adjudicating the rights and equities of oil and gas owners in the Tonkawa, Cottage Grove, Cleveland, Marchand, Des Moines and Atoka common sources of supply underlying Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

INITIAL REPORT OF THE HEARING OFFICER

These causes came on for hearing before Delores Joy Bledsoe, Hearing Officer for the Corporation Commission of the State of Oklahoma, on the 19th day of March, 1985, at 8:30 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission. CD

#122874 first came on for hearing on February 12, 1985, and was continued until March 14, 1985, and then to March 19, 1985. CD #123461 first came on for hearing on March 6, 1985, and was continued to March 19, 1985. On March 19th 1985, testimony and exhibits were taken.

At the time of the hearing, Michael D. Stack, Attorney, appeared for applicant, Ward Petroleum Corporation; Alice S. Mitchell, Attorney, appeared for Inexco Oil Company; John C. Moricoli Jr., Attorney, appeared for Greenleaf Energy Company; Richard J. Gore, Attorney, appeared for Nova Energies; James W. George, Attorney, appeared for McFarlane Company and Trimble Properties; Jerry Cord Wilson, Attorney, appeared for David M. Pulling, James E. Kuhlman, and Thomas Wygant; Rod W. Ylitalo, P.O. Box 10102, Enid, Oklahoma, 73702, appeared pro se; and Cheri M. Wheeler, Deputy General Counsel for Conservation, filed notice of appearance.

The Hearing Officer proceeded to hear the causes and reports as follows:

FINDINGS

1. a. That CD 122874 is the application of Ward Petroleum Corporation in the matter of adjudicating the rights and equities of oil and gas owners and designating the applicant or some other party as operator for the Tonkawa, Cottage Grove, Marchand, Cleveland, Des Moines, Atoka, Morrow and Springer common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

b. That CD 12461 is the application of Inexco Oil Company in the matter of pooling oil and gas interests, designating applicant or some other party as operator, and adjudicating the

rights and equities of oil and gas owners in the Tonkawa, Cottage Grove, Cleveland, Marchand, Des Moines and Atoka common sources of supply underlying Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

2. That the Commission has jurisdiction of the subject matter herein and notice has been given in all respects as required by law and the rules of the Commission.

Ward's first witness, Michael Cocheres, landman for Ward, has previously testified before the Commission and qualified as an expert landman. He is familiar with the application and the area and testifies that Ward has the right to drill, the unit, Section 23 of T12N-14W, was previously spaced as 640 acre unit by Order No. 197226; that this unit has been the subject of previous increased density applications CD 112204 for which an Order No. 274173 was issued on March 6, 1985, and was the subject of a location exception application for which Order No. 274669 was issued March 15, 1985; that Ward offered a proposal letter on December 31, 1984 to all of the parties then known and offered $1,500 plus 3/16 or to participate or a farmout for delivery of 75% net revenue interest with an option to convert 1/16 to 35% backin working interest. The AFE and the same proposal were sent to the respondents added when the application was amended on approximately January 31, 1985; that they proposed a 12,500 Red Fork test, and since the Red Fork is a member of the Des Moine, Ward will dismiss the Atoka, Morrow and Springer formations. He further testified that the well drilled will be under a turnkey contract; the rig is available; an AFE was reviewed on March 1, 1985, and shows the cost expected to be $913,500 if dry and $1,327,050 if completed as a producer; that $1,500 per net mineral acre and 3/16 royalty is fair market value; that fair market value would also be an offer of no cash plus 1/8 or 8/8 over and above the statutory 1/8 with

an option to convert to 50% backin proportionate to interest owned with election to be made 30 days after notice of payout and a party must have 81.25% net revenue interest to so elect. The witness testified that Ward would not oppose a lower farmout provision if Inexco wanted a lower provision because their own offer was based on an inhouse family transaction which was higher than other local transactions. The witness testified that the overriding royalty interest would absorb any burdens over and above the statutory 1/8. Ward wished to allow 15 days to elect; 20 days to pay or provide security for payment if the election is to participate; and 30 days for Ward to pay the bonuses if the cash bonus is elected. Ward wished 180 days to drill; if a party fails to elect and does not pay or provide security for payment they should be deemed to have elected the $1,500 plus 3/16 if they can deliver 81.25% net revenue interest and if they cannot deliver that amount then they would be deemed to have elected the farmout provision. Ward agrees to escrow any funds attributable to the interest of any party who is unknown or cannot be located at the time funds become due and payable. Ward wishes to be named operator and has a plugging security bond on file.

The witness testified that they based their offer on the following transactions in the nine section area surrounding Section 23: that An-Son paid $1,500 per acre in Section 13, the northeast offset, in July or August of 1984. The Wolfe #1 well was drilled by Inexco in the SW/4 of 23 to the Des Moine formation approximately June 1984. The only transaction in Section 23 since that drilling was the sale of a 159.5 acres from Vierson and Cochran to Nova Energies. The terms of that transaction provided for more than one well to the Red Fork common source of supply and deeper; that this transaction was for $2,700 per net mineral acre and included a 40% backin working

interest and this occurred within the last 60 days. (Subsequent testimony indicated that this backin was in fact 33% and not 40%) He testified that a pooling in the Section 24, the east offset, was within the last three weeks, and at that time the Vierson Cochran/Nova transaction was explained and that pooling was recommended at a different amount from the Vierson & Cochran transaction; in fact, that pooling recommended $1,500 plus 3/16 or no cash, delivering 75% net revenue interest, with a 50% backin.

As to farmout transactions in the area, the witness testified that Croesus Oil and Gas farmed out an interest covering Sections 23, 24 and four other units in 12N-14W to Nova and Greenleaf Energy which involved a 50% backin after 100% payout of any well in 23 providing they delivered an 81.25% net revenue interest. He stated that the typical farmout transaction was like that in Section 14, wherein Ward gave Belnorth a 25% backin if they could deliver an 81.25 NRI. This occurred in November 1984. Another atypical transaction was in a Ward employees farmin from other Ward relatives of 19+ acres involving to six or seven people wherein was provided the transaction of no cash and 75% net revenue interest before payout and 81.25 NRI after, with 50% backin. He stated that there were no other farmouts in the area.

The witness testified that they had contacted all of the parties on the first Exhibit A and had received green cards on all of them. That some of them have elected to participate and some have declared support for Ward. Some have not declared any preference at all. Of the respondents on the amended Exhibit A they have contacted the parties and have not received the green cards and have offered them as a late filed exhibit. The witness states that prior to distribution to their partners, Ward had 180 acres and they now claim 153 acres support along with 159.5

acres from Nova; 13.67 acres from Park Avenue; 6.62 from Clarkson H & R; and 6.63 from Clarkson J & J for a total of approximately 338 acres that they own or control. He stated that their partners are primarily investors, employees, relatives and business partners who, along with Ward, bought acreage as a group and all are contractually bound to support Ward for operator. He states that Inexco has 198 acres under lease and is claiming 195 acres from the force pooled acreage in the previous pooling under which the Wolfe #1 well was drilled. He states that Inexco alleges that acreage inures to subsequent wells in the unit. The witness recommends as per agreement with Nova that Ward be operator until May 1, 1985, 11:59 p.m., and if the well is not commenced by that time and date, then Nova would take over operations until June 1, 1985; if that by time and date Nova had not commenced operations, then operations would revert automatically to Ward to protect their farmouts. Nova has a farmout of 11 acres and it has a June 1, 1985 spud date requirement. Ward agrees to pay initial bonuses and to transfer all escrowed participation funds to Nova if Nova takes over. He recommends Ward as operator (1) because Inexco's position is contrary to Commission policy regarding pooling by the wellbore, and jeopardizes Ward and their partners, and Ward will see that revenues are distributed correctly; (2) Ward has 338 acres of the unit supporting Ward as operator; (3) Ward proposed first; (4) they were first to settle damages from the land owners; (5) Ward's AFE turnkey cost guarantees the cost through the casing point; (6) Inexco's AFE does not guarantee such cost; (7) Ward and Inexco have previously had dealings as Inexco drilled in the SE of the section and it was dry. Ward then wanted to move north in the unit but Inexco still wanted to drill in the southern part of the unit; the Wolfe was then drilled and Ward did not contest operations and now wants a chance to

drill in the northern part of the unit. Inexco was advised that Ward wanted to drill north but they had some leases expiring and wanted to drill in the south to hold the leases. They requested that Von Martin of Inexco write a confirmation letter in which he stated that Inexco would not move the well after Ward elected not to protest. Exhibit #26 is a copy of that letter.

John C. Moricoli appeared in support of Ward's operation and wanted to know what type of security Greenleaf would be required to put up and was advised that dry hole cost and separate escrow would be sufficient.

Richard J. Gore appeared for Nova Energies in support of Ward's operation and brought out at this time the fact that the backin in Vierson and Cochran Nova transaction might well be less than 40%.

Cross-examination by Alice S. Mitchell revealed Ward itself owns 18.3 acres which are subject to dispute by Inexco based on Inexco's interpretation of pooling by the unit; that Ward Exploration owns about 17.88 acres which is also in dispute for the same reason; that Ward owns approximately 4.5 acres of undisputed acreage which is approximately 5% of the working interest; the witness did not have any knowledge of Inexco's plans in the unit following the drilling of the Wolfe well and stated that Ward did not dispute the operations of the Wolfe well. He stated that he did not know when Inexco filed their pooling or when they filed their increased density; however, when Ms. Mitchell reminded him of a letter that he had written to Inexco advising them of his disagreement with their interpretation of pooling by the unit policy, he remembered that he may have had some information about their activities. He stated that he has seen Inexco's AFE but he objects to it because it is higher than Ward's cost and states that

respondents would pay the turnkey price whether the actual turnkey costs are higher or lower than the AFE. He testified that Nova owns an interest in the unit but that it is in dispute. He testified that Vierson and Cochran, from whom Nova purchased their interest, elected not to participate in the prior pooling and this is the basis of the dispute over Nova's interest. He testified that Nova has not operated any wells and that Ward has drilled two wells in the nine section area, the Wilks #1 in Section 27 which is the southwest offset, (a Des Moine well in 1984) and are currently drilling in Section 24, the Folks #2 well. He was asked why the transactions involving the Ward employees was not indicative of fair market value and he responded that the interest was kept in-house and was within the last few weeks which was subsequent to the filing of this application. He knows of no other 50% backin transaction. He states that the most typical transactions involved 25% backin and this was given by Ward in Section 14 in November of 1984 and that he does not know of any 35% backin in the area although they did offer that in their initial proposal letter. He states that Clarkson's interest indicated they supported Ward because they were asked to sign the AFE in support and they did so sign. He testified that Ward would escrow dry hole costs at the Central National Bank and Trust Company in Enid, Oklahoma. The witness testified that if Ward is named operator they will pay the bonuses to the disputed interests that they have listed as owning an interest even though knowing Inexco claims those interests; that they would allow Inexco to furnish the pipe in kind and would not allow casing point election outside of JOA; that they would not want the gas balancing agreement as part of the pooling order but would consider it in relationship to the joint operating agreement. At this time he was reminded that Section 24 pooling was actually at $1,000 and not $1,500

and there was some confusion about that.

Upon redirect he testified that although Ward owns only approximately 5% of a working interest that there are some et als associated; for instance Myra B. Ward, wife of Lou Ward, the sole owner of Ward Petroleum owns 22.9 acres; Carole J. Drake, sister to Myra Ward, owns 22.9 acres; and the estate of Carl E. Gungoll, who was the father of Myra and Carol, owns 22.9 acres; and until recently all these parties were under the same roof; also, the head engineer of Ward owns approximately 3.9 acres and will be the chief supervisor on this particular well. This is a total of 108 acres of the 640; Ward maintains that this increases their exposure and costs risk.

The witness testified that Inexco's proposal letter on January 23, 1985, was their first official notification of Inexco's plans; that they probably knew of their intent to drill by the location exception and increased density applications but this letter was the first official notice. The actual letter offered them the right to participate but only if they had elected to participate under the Wolfe well; that if they had elected not to participate under the Wolfe well, then Inexco construed their relinquishment of the right to participate in that well to extend to all subsequent wells in that unit. Regarding the Folks well in Section 24, Inexco was participating to their 50% and Ward's interest was the rest of the unit. Ward Exploration Company had approximately 5% and the family members owned the rest. He stated that if Ward operates the well and the well is a producer, Ward will pay the proceeds according to the rules and regulations of the Commission.

Nova Energies is in support of Ward's operations and presented testimony by Greg Byrum, landman employed by Nova, who has testified previously and been qualified. He states

that he is familiar with the application and that Nova does have a plugging security bond on file. He states that Nova is a competent operator who is ready to assume operations effective May 1, 1985; that Nova has operated in the area; that they have examined Ward's AFE and will comply. Mr. Byrum said that they do intend to take over the operations by May 1985 and if they do not commence drilling by June 1, 1985, they will lose portion of their acreage.

He testified that the transaction with Vierson and Cochran was a standard oil and gas lease and was for 1/3 backin, not 40%, and $2,700 per acre bonus. In this transaction Vierson & Cochran had requested a limitation to one wellbore which Nova refused because they wanted the ability to drill more than one. He states he is personally familiar with this transaction.

He states that he has no information regarding a farmout from Croesus; that they acquired their farmout from Greenleaf who dealt with Croesus; that they want to protect their farmout which requires them to spud before June 1, 1985, and he does not know whether his farmout was acquired before filing of this application.

Inexco presented testimony by Bret Ames, landman, employed by Inexco, who has previously testified and been qualified to testify before the Commission. He says that he is familiar with the application and with this area and that Inexco has the right to drill. He states that Inexco issued their original proposal letter on January 2, 1985, and have attempted to contact all the parties personally; they are dismissing no one at this time; he testifies that the AFE from Inexco was prepared on March 15, 1985; that dry hole costs are $980,750; completed costs are $1,438,750 and they expect a single completion. He recommends options of $1,500 and 3/16 or no cash bonus and

1/8 of 8/8 over and above the statutory 1/8 or to participate. He states that Inexco will abide by the Commission rules regarding escrow accounts for unknown or unlocatable parties.

Inexco testified that the Wolfe #1 well was spud on February 27, 1984, and completed on September 5, 1984; that Inexco filed an increased density on December 12, 1984 in CD 122265 and filed a location exception on December 21, 1984, CD 122430; that Ward filed their increased density application on January 7, 1985, CD #122204; and their location exception application on January 15, 1985, CD 122875. The witness testified that Inexco pooled Section 23 by CD 108567; an order was issued on June 6, 1984; at that time their AFE costs were $1,194,250 for dry hole costs and $1,598,250 for completed costs and they were able to bring the well in for actual costs of $1,499,503. In the previous pooling, in Order No. 260474, the fair market value was established at $1,250 plus 3/16; no bonus and 1/8 of 8/8 over the statutory 1/8 and no backin; he states that the current fair market value in this area is $1,500 and 3/16, or no bonus, delivering 75% NRI before payout with an option to convert 1/16 to 25% working interest after payout. He testified as to other transactions in the nine section area and stated that most of the surrounding units had been pooled in varying amounts. Section 13, Section 24, Section 14, and Section 23 had been pooled over the last six months for $1,250 per net mineral acre or no cash and 25% with no backin. Section 24 had also been pooled in March 7, 1985, for $1,000 per net mineral acre plus 3/16 or no cash and then a 50% backin for 1/16. Section 25 had been pooled in October, 1983, for $1,100 per net mineral acre plus 3/16 or no cash and 25% with no backin. Sections 26, 27, 22 and 15 had been pooled over the last year for $1,500 and 3/16 pre net mineral acre or no cash and 25% with no backin. There was a farmout from Belnorth in

Section 14 which was for a 25% backin with a 81.25 net mineral interest delivery after payout. The only other transaction was within the Ward group for 19.2 acres from six or seven people to another six or seven people within the organization. This transaction was for a 1/16 of 8/8 exchange for 50% backin. The witness has spoken to all operators in the surrounding area and none has offered or been offered this particular transaction at that value. Inexco says this is not fair market value because it was a family transaction. He states that the only lease transaction in the disputed acreage was from Vierson and Cochran to Nova in the amount of $2,700 with a overriding royalty convertible to 33% backin. This was dated January 28, 1985. He states that this is not indicative of fair market value. He states that no farmout was offered under the previous pooling. There was some attempt at this time to testify as to the money spent on the previous pooling, but there was an objection to this testimony as being irrelevant and the objection was sustained.

The witness offered Exhibit #28 to show Inexco's activity in the area; it shows that Inexco has operated three wells to the same geological objective as the one now proposed and has participated in three others with significant interest. He testified that in the Anadarko Basin generally Inexco has drilled over 90 wells to this depth or greater and has participated in 350 wells. The witness stated that the first well in Section 24 was drilled by Inexco and Ward is drilling the increased density well in that unit.

The witness testified that they checked records and title opinions and have sent proposal letters to all the respondents. He states that they have support of numerous respondents by means of a JOA from the Wolfe well drilled previously in this unit. Nine of the parties signed the JOA for a total of approximately 73.36034 acres. He states that the following parties are

committed to Inexco as operator: Amoco Western for PC Limited, Ibex Production, BBL Limited, and Boyd Street Joint Venture in the amount of 3.6 acres; Santa Fe Energy in the amount of 1.06 acres; Robert A. Adair in the amount of 3.5 acres; Buttram Energies in the amount of 2.9 acres; and Creosus in the amount of 11.19 acres which along with Indrex's 51 acres totals the acreage under their operating agreement. The witness stated that they own or control over 465 acres; that Inexco has 190 of their own acres; according to this witness Ward owns none; Ward Exploration owns 4.3; that the Ward disputed acreage is approximately 35% of the unit. Inexco says that the JOA designates them as operator of the unit. There was an objection at this point that this JOA cannot be interpreted in this forum and it was sustained.

There was also some testimony from this witness that Ward cannot speak for all of their et als; that he has spoken to these people and they all maintain that they elect independently and maintain their rights independently. He states that he spoke to Carole Drake, who is Mr. Ward's sister-in-law, and she states that she had not been informed of the unit/wellbore controversy and will have to check with the Ward organization. According to this witness, Carole Drake speaks for the Carl Gungoll estate also. He further states that he has spoken to another Ward employee, Rod Ylitalo, who maintains that he makes his independent elections also but seeks Wards input on decisions.

As to Clarkson's interests, this witness states that An-Son claims for the Clarkson's interests in the same way Ward claims for Ward's et als, but Clarksons and some of the Ward people have signed AFEs supporting Inexco. Inexco continues to maintain that Nova has no interest in this unit at all.

This witness requests 15 days to elect; 20 days to pay or present security for payment if the election is to participate, and 30 days for Inexco to pay the bonus if the bonus is elected or deemed to be elected. If no election is made or if no payment is made after electing to participate the party should be deemed to have elected the cash bonus unless the burdens are over 3/16 in which case they should be deemed to have elected the farmout agreement. Inexco has a plugging and security bond on file and they do request 180 days to drill. They have a rig available. Inexco states that they will be willing to escrow the disputed amounts of money until such time as dispute is settled. They are offering a casing point election and request one from Ward if Ward is named operator and in a form similar to Exhibit #29 now offered. They also request a gas balancing agreement in similar to form as Exhibit #30 here offered from Ward if Ward is made operator and offer it themselves. They also offered as late filed Exhibit #31 a letter which was written to Inexco from Ward after Inexco's increased density and location exception filings, which according to Inexco, is proof that Ward's plan of development of the unit occurred subsequent to Inexco's activity to develop.

Cross-examination by John C. Moricoli for Greenleaf brought out that 202.59 acres of the total acreage claimed by Inexco is disputed acreage claimed by Inexco under the JOA of the previous pooling; that two other orders, increased density and location exception, name Inexco or Ward as operator, to be determined by this pooling application, and that Inexco was not willing either to begin by a spud date of June 1, 1985, as requested by Greenleaf, or to transfer operations to Nova. The witness maintains that Vierson and Cochran own no interest in the unit but were named as respondent due to legal advice and that Inexco is willing to escrow a proportionate share of dry hole costs.

Under cross-examination by Mr. Gore, the witness testified that they will not make any particular effort to save Nova's farmout agreement based on the testimony given at this hearing. They do agree that Ward is a competent operator.

Under cross-examination by Mr. Stack, the witness testified that they will escrow the revenues on the well according to the requirements of the courts or the settlement of the dispute. They will adhere to Commission rules and regulations subject to final judicial determination. The witness observed that Ward's AFE was less than Inexco's own dry hole cost but could not say that it was less than the actual cost of the Wolfe well because turnkey is only to the casing point and not to completion. The witness testified that they have not paid for surface damages on this well.

Cross-examination by Jerry Cord Wilson brought out that the respondent's right to drill would be based only on retained interest from the Wolfe well and these would be recognized by Inexco. Any interest for which the cash bonus or the higher royalty interest was elected would not be recognized as giving the right to drill. The witness testified that the casing point election is not generally offered but since Inexco is offering it, they would like to have the opportunity to have such an election.

James W. George, for McFarlane Company and Trimble Properties, made a separate statement regarding their participation in the Wolfe well. He states that both parties participated in the unit well and development of the unit and elected a proportionate share of the pooled acreage, and their intent at that time was to share in the entire unit and not just the wellbore. They are still claiming the relinquished share of the previous well; they probably will participate in this well and claim interest both in this well and the previous proportionate share of pooled

acreage. He states that if some greater court decision determines that they cannot have that previous relinquishment, they are now requesting a pro rata share in this well's pooled acreage. He specifically does not take a position regarding support either of Ward or Inexco. He states that his principals have dealt with both entities and find them both competent.

A separate statement was made by Rod W. Ylitalo who stated that he is an employee of Ward and an owner of interest in this unit; that as an individual and not as an employee he supports Ward as operator.

CONCLUSIONS

1. The Hearing Officer finds from the testimony and evidence presented in this cause that Ward Petroleum Corporation should be granted its request in the matter of adjudicating the rights and equities of oil and gas owners and designating Ward Petroleum Corporation as operator for the Tonkawa, Cottage Grove, Marchand, Cleveland and Des Moines common sources of supply underlying all of Section 23, T12N, R14W, Custer County, Oklahoma. They have dismissed the Atoka, Morrow, and Springer common sources of supply.

2. Under the current position of the Commission regarding pooling by the well-bore rather than by the unit, Ward has by far the greater acreage in the unit, i.e. 338 acres compared to Inexco's 195 acres. Inexco's claim of 495 acres is based on their claim that they still have control of all the relinquished acreage from the previous pooling and the acreage included in the joint operating agreement on the existing well, the Wolfe #1.

3. Ward further testifies that they will protect other parties leases and farm-outs which have spud date requirements, whereas Inexco testifies that these leases are invalid, based on their own claim of the disputed acreage.

4. This Hearing Officer further finds that the AFE costs submitted by both parties are very similar. However, Ward's estimate of $913,500 for dry and $1,327,050 for completion is thousands less than Inexco's estimates of $980,750 for dry and $1,438,750 for completed. The fact that Inexco brought in the Wolfe #1 for less than AFE estimate is, of course, no guarantee that they can do the same with the proposed well.

5. Both parties testified to a fair market value considerably less than the last transaction in the area. Viersen and Cochran's sale to Nova Energies of 159.5 acres in the unit for $2,700 per acre with a provision for converting a portion of the retained interest to a 33% working interest is not insignificant. Both parties state this transaction is not indicative of fair market value because it includes different formations and more wells than the pooling includes, and has been so established by the Commission in a previous pooling in Section 24, the east offset to the unit herein considered. That may be so for an offset, but it is more difficult to ignore a transaction of that size in acreage and bonus in the very unit concerned. There was testimony that the Viersen and Cochran/Nova Energies transaction included the same target formation as in this pooling and the provision for additional wells should not take it completely out of consideration, especially since the Commission has historically considered standard oil and gas leases in an area as indicative of fair market value. These leases often provide for more formations, wells, or time than a pooling does, since a pooling is limited to one well (unless simultaneously pooling more than one unit) and a six month maximum term.

6. Therefore, because this transaction is relevant, and Ward itself offered an option of no cash with a 50% back-in, and there were farmouts between Croesus and Greenleaf at 50% backin after 100% payout, and the Ward employee transaction

providing a 50% backin, it is this Hearing Officer's recommendation that fair market value should be established at $2,700 per net mineral acre plus a 3/16 royalty (1/16 of 8/8 plus the statutory 1/8), or in lieu of cash, an option of no cash with a royalty of 1/8 of 8/8 over and above the statutory 1/8, with 1/16 convertible to a 50% back-in.

7. The Hearing Officer further recommends that Nova Energies be granted the right to operate the well if Ward has not commenced by May 1, 1985. Thereupon if Nova does not commence by June 1, 1985, Ward shall automatically become operator again. Any funds paid into either party as operator, under the elections allowed, shall be transferred within five days to the other if there is an operator change. Nova must affirmatively elect to participate to take adventage of this provision, and whichever party operates the well, the other will still participate. Ward has agreed that whichever is ultimately operator of the well, Ward will pay initial bonuses. The Hearing Officer further recommends that Nova affirmatively elect within 48 hours of 11:59 p.m. May 1, 1985, to take over operations. If they do not do so within that time, Ward should remain operator.

8. The Hearing Officer further recommends allowing a casing point election.

9. The Hearing Officer specifically does not recommend inclusion of a gas balancing agreement in the order. Any such agreement is a private contract.

10. The Hearing Officer finds that substantial evidence was presented to support all other applicant's recommendations.

RESPECTFULLY submitted this 29th day of March, 1985.

/s/Delores Joy Bledsoe

Delores Joy Bledsoe
Hearing Officer

ac
xc:

Michael D. Stack
Alice S. Mitchell
John C. Moricoli Jr.
Richard J. Gore
James W. George
Jerry Cord Wilson
Rod W. Ylitalo
Cheri M. Wheeler
Paul Peterson
File—2

(2)

FILED
MAR 29
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1447

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L.O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, AND JAMES HASENBECK,

Petitioners

v.

THE LOUISIANA LAND AND EXPLORATION COMPANY, AS SUCCESSOR BY MERGER AND ACQUISITION TO INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (COMPOSED OF JAMES B. TOWNSEND, BOB HOPKINS, AND BOB ANTHONY), ROBERT H. HENRY AS ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, ROD W. YLITALO, MCFARLANE COMPANY, AND TRIMBLE PROPERTIES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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March 29, 1989

29 pp

RULE 28.1 STATEMENT

As required by Rule 28.1 of this Court, the corporate Respondent, The Louisiana Land and Exploration Company, lists the following parent companies, subsidiaries, or affiliates:

A. Respondent, The Louisiana Land and Exploration Company, has no parent corporation.

B. Following are the subsidiaries of such Respondent:

1. Candex Development Limited.
2. CL&E Corporation
3. HM Copper, Inc.
4. Inexco Oil Company
5. Inexco Mining Company
6. Wilson Brothers Drilling Company
7. Wilson Brothers Corporation
8. Jacintoport Corporation
9. Kaluakoi Corporation
10. Kaluakoi Lands, Ltd.
11. LL&E Alberta, Inc.
12. LL&E Canada, Ltd.
13. LL&E Columbia, Inc.
14. LL&E Egypt, Inc.
15. LL&E Espana, Inc.
16. LL&E (Europe-Africa-Middle East) Inc.
17. LL&E France, S.A.
18. LL&E Gas Marketing, Inc.
19. LL&E, Inc.
20. LL&E International, Inc.
21. LL&E Mining, Inc.
22. LL&E (Netherlands) Inc.
23. MaraLou Netherlands Partnership
24. CLAM Petroleum Company
25. LL&E Netherlands Petroleum Company
26. LL&E Overseas Petroleum, Ltd.
27. LL&E Petroleum Marketing, Inc.
28. LL&E Petroleum Terminals, Inc.

29. LL&E Petroleum Resources International, Inc.
30. LL&E Pipeline Corporation
31. LL&E Suez, Inc.
32. LL&E Tunisia, Inc.
33. LL&E (U.K.) Inc.
34. LLOXY Holdings, Inc.
35. LLOXY Production Financing Company, Inc.
36. Molokai California Limited
37. Sun Fire Coal Company
38. Warrior River Coal Company
39. White Pine Leasing, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L.O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, AND JAMES HASENBECK,

Petitioners,

V.

THE LOUISIANA LAND AND EXPLORATION COMPANY, AS SUCCESSOR BY MERGER AND ACQUISITION TO INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (COMPOSED OF JAMES B. TOWNSEND, BOB HOPKINS, AND BOB ANTHONY), ROBERT H. HENRY AS ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, ROD W. YLITALO, MCFARLANE COMPANY, AND TRIMBLE PROPERTIES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

This matter comes before the Court on Petition of Ward Petroleum Corporation, et al. ("Petitioners") for Writ of Certiorari served upon The Louisiana Land and Exploration Company ("Respondent") on February 27, 1989. In opposition thereto, Respondent sets forth the pertinent facts, and controlling authorities, demonstrating that no reasons exist herein to grant the Petition.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

I. The Oklahoma Oil And Gas Conservation Laws

The Petitioners have included in their Petition for a Writ of Certiorari a self-serving Statement of the Case which includes an unsupported statement of the rationale behind the Oil and Gas Conservation Laws of the State of Oklahoma. There is nothing in the record of this case to base such a statement upon, and it includes a number of inaccuracies, both factual and legal. Those errors found by the Respondent to be harmless are ignored herein. However, certain assertions of the Petitioners must be addressed.

In the Petitioners' geological dissertation, it is claimed that the Oklahoma Oil and Gas Conservation Laws dictate that "the unit is developed one well at a time." However, the valid creation of drilling and spacing units by the Oklahoma Corporation Commission depends upon a number of factors, only one of which relates to the ability of a well to drain from the geological reservoir. Drilling and spacing units are established within geological common sources of supply.[1] The initial order establishing a common source of supply creates a certain size of unit, generally varying from 2-1/2 acres to 640 acres, based upon a finding relating to whether oil or gas will be the predominant hydrocarbon produced, and prelimi-

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[1] Okla. Stat. Ann. tit. 52, Section 86.1(c) (1981) provides as follows:

The term "common sources of supply" shall comprise and include that area which is underlaid or which, from geological or other scientific data, or from drilling operations, or other evidence, appears to be underlaid, by a common accumulation of oil or gas or both; provided, that, if any such area is underlaid, or appears from geological or other scientific data, or from drilling operations, or other evidence, to be underlaid by more than one common accumulation of oil or gas or both, separated from each other by a strata of earth and not connected with each other, then such area, as to each said common accumulation of oil or gas, or both, shall be deemed a separate common source of supply.

nary expert estimate of the amount of acres to be drained by one well within the common source of supply.[2] It is generally recognized that drilling and spacing units in Oklahoma are prospectively created.[3] In other words, the drilling and spacing unit is established prior to the drilling, completion and analysis of the first unit well.[4]

If, after the common source of supply has been defined by the Oklahoma Corporation Commission, the drilling of wells establishes a need to enlarge or extend the common source of supply, the Oil and Gas Conservation Laws authorize an interested party to apply for an expansion of the boundaries thereof to include adjacent lands.[5] These extensions of the common source of supply are no longer subject to a finding as to the ability of a well to drain. The statute dictates that the drilling and spacing units covering the expanded area be of the same size and shape as

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[2] title 52, Section 87.1(c) provides that the following facts are material to creation of a drilling and spacing unit:

(1) The lands embraced in the actual or prospective common source of supply;

(2) The plan of well spacing then being employed or contemplated in said common source of supply;

(3) The depth at which production from said common source of supply has been or is expected to be found;

(4) The nature and character of the producing or prospective producing formation or formations;

(5) Any other relevant geological or scientific data.

[3] See Id., at Section 87.1(c) (1).

[4] This fact is implicitly recognized by the Oklahoma courts in decisions relating to the pooling authority granted under title 52, Section 87.1(e). In *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d 203 (Okla.App. 1986) (Adopted by the Supreme Court of Oklahoma February 9, 1988), the Court found that original elections under pooling orders are sometimes based upon lack of information. The Court was unsympathetic to an owner who chose not to risk money in the unit well, but who, after discovering information generated at the expense of others in its drilling, wanted to participate in subsequent wells.

[5] title 52, Section 87.1(a)

nder the initial spacing order, unless certain facts re proven to justify otherwise.[6]

No matter the size of the drilling and spacing unit stablished within a common source of supply, the pacing order allows only one well to be drilled and roduced thereon. Each spacing order carries with it ne implication that the one authorized unit well will dequately develop the unit. Therefore, it is not nough to state simply that "under Oklahoma Law, he unit is developed one well at a time." A more ccurate statement is that until there has been a hange in the conditions assumed by the Oklahoma Corporation Commission to exist on the date a drilling and spacing unit is created, or until the knowledge of such conditions changes, the unit is to be developed by the one unit well.[7] As will be discussed more fully hereafter, this is the primary concept recognized by the Oklahoma Supreme Court in the decision appealed from by the Petitioners.

The "pooling application" referred to by the Petitioners is authorized by the Oil and Gas Conservation Laws of Oklahoma.[8] The Petitioners incorrectly imply that only the owners of oil and gas leasehold interests within a drilling and spacing unit may sponsor such application. Under Oklahoma law, any party

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[6] Id.

7 In fact, title 52, Section 87.1(c) specifically limits the density of well spacing by providing as follows:

> Subject to other provisions of this act, the order establishing such drilling and spacing unit shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission, . . .

[8] Title 52, Section 87.1(e) states that when two or more owners within a drilling unit have not agreed to pool their interests and a unit well has been proposed, or drilled, the Corporation Commission of Oklahoma shall "upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit."

owning *a right to drill* within the drilling and spacing unit, a phrase which would include unleased mineral owners, can apply for a pooling order. The Petitioners also incorrectly state that the pooling application "identifies the location of a proposed well within the unit. . ." Neither the Oil and Gas Conservation Laws, nor the Rules of the Corporation Commission of Oklahoma, require that a well location be specified within the application.[9] As a practical matter, applications for pooling never mention location. More importantly, the application in Cause CD No. 108567, the cause which resulted in the original pooling order in controversy in this case, did not specify any location for the unit well.

The Petitioners erroneously assert that an owner who elects not to participate[10] in the risk and expense of drilling the unit well is electing "not to share in any resulting revenues." The Oklahoma Corporation Commission is authorized to enter pooling orders only upon terms which are just and reasonable.[11] The pooling orders of the Commission have evolved into instruments which offer alternatives to participation in the risk of drilling the unit well. Those alternatives generally include either

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[9] See title 52, 87.1(e). The Rules of Practice of the Oklahoma Corporation Commission require only that the pooling application identify the applicant; provide the legal description of the drilling and spacing unit; list the case number assigned to the application; provide the name and address of each respondent; allege certain jurisdictional facts; cite the legal authority for Commission jurisdiction of the matter; state that the applicant cannot reach agreement with the respondents; and, identify the proposed unit operator. See Oklahoma Corporation Commission Rules of Practice, Rule Nos. 8-1 and 8-3.

[10] The Petition continually uses the phrases "opt out" and "opt in" and gives the impression that these are technical terms of art. Pooling orders of the Oklahoma Corporation do not use such terms, but simply require that owners elect either to particpate in the costs of drilling the unit well, or take compensation in lieu thereof. See Ex. 32; R. 142, 117.

[11] title 52, Section 87.1(e).

cash bonus and royalty interest; or no cash but an increased royalty interest. In either event, the party electing such alternatives will continue to share in revenues. Admittedly, the extent of sharing will depend upon the alternative selected, and will be less than the share realized by participating parties. However, the parties' reduced share results from their desire not to assume the financial risks taken by the participating owners.

The Petitioners make a very misleading statement by equating the process of obtaining authority to drill a second well upon a drilling and spacing unit, to seeking a "second forced pooling order." There is simply no connection between an application for an additional well, and an unauthorized attempt to obtain a second pooling order covering a drilling and spacing unit which is already subject to a valid pooling order.[12]

The Petitioners raise in their Statement of the Case what is identified as a key question. The Petitioners ask whether the election not to participate in the risk and expense of the unit well results in a relinquishment of the right to participate in any future development. This Court does not have jurisdiction to respond to the question. The answer was given by the Oklahoma Supreme Court in *Inexco Oil Co. v. Corporation Commission of Oklahoma*,___ P.2d ___, 59 Okla. B.J. 1978 (July 6, 1988), and is no longer open to discussion. The answer was the product of construction of state law by that court. That fact alone dictates denial of this Petition for Certiorari.

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[12] Authority to drill an additional well upon a drilling and spacing unit comes from title 52,Section 87.1(b) and (d). Those portions of the statute are unrelated to the authority for pooling found in title 52, Section 87.1(e).

II. The Original Pooling Order Covering The Drilling And Spacing Unit, And The Improper Attempt Of The Oklahoma Corporation Commission To Enter A Second Pooling Order.

In the portion of the Petitioners' Statement of the Case relating to the pooling orders in controversy, the Petitioners state that at the time the drilling and spacing unit in question was created information was available to suggest "the presence of much oil and gas in this unit." To the contrary, there were no wells on the unit at that time, and only by taking the financial risks associated with drilling could parties generate such information.[13]

There is nothing in the record to suggest that "the owners of oil and gas interests discussed the optimal location" of the unit well. The record reflects only a discussion between Inexco Oil Company and Ward Petroleum Corporation.[14]

Inexco Oil Company, the predecessor of The Louisiana Land and Exploration Company, filed an original pooling application with the Oklahoma Corporation Commission covering Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma. That tract was a 640-acre drilling and spacing unit for a number of separate and distinct common sources of supply previously established by the Oklahoma Corporation Commission. The common sources of supply covered were the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand. Each common source of supply represented a separate and distinct accumulation of hydrocarbons thought to exist beneath Section 23. The Petitioners incorrectly state that Inexco sought to pool "the Red

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[13] See *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d at 207.

[14] R. 57.

Fork member of the Des Moines common source of supply." The pooling application of Inexco, and the order which resulted therefrom, do not even mention the term "Red Fork."

Order No. 260474, the only valid and final pooling order covering Section 23, designated Inexco Oil Company as unit operator. A party who chose to participate in the risk of the unit well was required to pay to Inexco that party's share of the cost of such operation. The order's reference to the unit well was appropriate given the fact that only one unit well was authorized. The Oklahoma Corporation Commission could hardly require that participating owners pay to Inexco monies associated with wells which might be necessary in the future.

The Petitioners incorrectly state that an owner who elected not to participate in the unit well surrendered to Inexco that owner's oil and gas interests. Such owner did relinquish its right to participate in any subsequent well, and did relinquish the working interest[15] associated with its oil and gas interest. However, in exchange, the owner received either a cash bonus and a royalty interest, or no cash but an increased royalty interest or overriding royalty interest.[16] The reduction in revenue interest results

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[15] The term "working interest" is defined in H. Williams and C. Meyers, *Oil and Gas Terms* (7th Ed. 1987) as "the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land." As noted therein:

> In the simple situation of a lessor who executes a lease, reserving 1/8th royalty, to a lessee who creates no burden on his estate, the working interest consists of 7/8ths of production subject to all costs of exploration and development.

[16] In *Meeker v. Ambassador Co.*, 308 F.2d 875, 882 (10th Cir. 1962), *Rev'd* 375 U.S. 160 (1960), rehearing denied 375 U.S. 989 (1964), the following definition was offered:

> An overriding royalty is a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing and other

from the non-participating owner's decision not to take the risk of drilling.

The Petitioners quote from Paragraphs 2.c and 4 of Order No. 260474, emphasizing the inclusion of the word "well" in those provisions. Of course, as noted above, on the date of that order only one well was authorized to be drilled in Section 23. More importantly, the Respondent notes that the Petitioners' emphasis on this aspect of the order, when considered against the Oklahoma Supreme Court's construction of same, illustrates the defect existing in this appeal.

The Petitioners again assert that the Petitioners "had differed sharply" with Inexco over location of the unit well. There is no evidence of record that any party, other than Ward Petroleum Corporation, disagreed with the location of the unit well. Moreover, it is preposterous to claim that the Petitioners elected out of the unit well based on a belief that a second well would be drilled. To begin with, the record is devoid of any testimony to support such a statement. Secondly, an additional well within a drilling and spacing unit can only be drilled upon authority from the Oklahoma Corporation Commission. That authority is given only upon proof that the unit well cannot adequately develop the drilling and spacing unit. As such, it would have been purely speculative to conclude a second well would ever be authorized, let alone drilled.

The Petitioners wrongfully attempt to inject into this appeal information which is outside the record of the case below. The reference to the drilling of the "Albright well" and the results of such well are unsupported by the record. From the statements

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costs incident to the production and sale of oil and gas produced from the lease. It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest.

made, it would appear that such well was drilled long after the cause was tried at the Oklahoma Corporation Commission, and the appeal to the Oklahoma Supreme Court commenced. There is no justification, either factually or ethically, for including unsubstantiated figures relating to revenues for that well. The Respondent has never had any opportunity to contest such figures, or to submit facts in opposition thereto.

SUMMARY OF ARGUMENT

I. The Issues Presented For Consideration By The Petitioners Do Not Raise Federal Questions.

A) The facts in the record of this cause illustrate that the decision of the Oklahoma Supreme Court does not raise the issue of a taking of private property in violation of the Fifth Amendment.

1) The question relating to whether the Oklahoma Supreme Court unlawfully took Petitioners' property depends upon an assumption that there existed property to be taken.

2) The decision of the Oklahoma Supreme Court, premised upon a construction of state statutes, determined that Petitioners did not own the property interest assertedly taken, same having been previously relinquished to the Respondent.

3) Therefore, the effect of Petitioners' request in the Petition is a plea to this Court to review the construction of state statutes performed by the Oklahoma Supreme Court.

4) This Court has no jurisdiction to review the decision of a state supreme court regarding state law, and the writ should be denied.

B) The record of this case reveals that the Petitioners were not deprived of due process rights guaranteed by the Fourteenth Amendment.

1) The property rights relinquished by the Petitioners were transferred to the Respondent under the original pooling order.

2) Petitioners do not claim that the original pooling order was deficient. A claim that such order was not preceded by notice and an opportunity to be heard would be necessary to establish a due process violation. Such a claim is not made.

3) The failure of the Petitioners to appeal the original pooling order permanently foreclosed their ability to attack the effect of such order upon their oil and gas property interest.

4) This appeal is a continued attempt to collaterally attack the original pooling order.

C) The decision of the Oklahoma Supreme Court does not retroactively divest Petitioners of vested rights.

1) The Oklahoma Supreme Court did not change the original pooling order.

2) The construction of the original pooling order by that Court coincides with its construction of state law.

3) The construction of state law by that Court was foreseeable.

4) A party electing in response to the original pooling order was on notice of the potential construction of state law so as to yield unit pooling.

ARGUMENT

This Court should deny the Petition for Writ of Certiorari filed herein. The ruling of the Oklahoma Supreme Court does not decide a federal question. Obviously, such ruling does not conflict with decisions of another state court of last resort, or of a federal court of appeals. Finally, the ruling does not decide a federal question in a way in conflict with applicable decisions of this Court.

The opinion of the Oklahoma Supreme Court depends upon such Court's construction of state oil and gas conservation laws. The Petition asks that this Court overturn that ruling. To do so, this Court must disagree with the construction of state law made by the court of last resort in Oklahoma.

The assertion of an unconstitutional taking is a veiled attempt to avoid the long standing position of this Court that state courts are allowed to decide state questions. The decision of the Oklahoma Supreme Court was that the oil and gas conservation laws of Oklahoma authorize only unit poolings. Under unit poolings the election not to participate in the risk of the unit well results in an assignment of the right of further participation. That assignment carries with it the working interest associated with the non-participants' oil and gas rights.[17] It is that bundle of rights which the Petitioners claim to have had taken by the Oklahoma Supreme Court. Petitioners were possessed of those rights only if the original pooling order was limited in scope to the wellbore of the unit well.

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[17] *Amoco Production Company v. Corporation Commission*, 751 P.2d at 206-207. See also *Ranola Oil Co. v. Corporation Commission*, 752 P.2d 1116, 1119 (Okl. 1988)

PROPOSITION I.

THE DECISION OF THE OKLAHOMA SUPREME COURT DID NOT RESULT IN AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY OWNED BY THE PETITIONERS.

The Respondent does not disagree with the Petitioners' assertion that an oil and gas leasehold interest is private property which, if taken by virtue of governmental action, entitles the owner to just compensation for its value. Each of the cases cited by the Petitioners refers to the general principles of law which apply to a Fifth Amendment taking. See also Sax, *Taking and the Police Power*, 74 Yale L.J. 36, 37 (1964). What the Petitioners fail to recognize is that the Court in those cases was not asked to rule on the issue of whether there existed any property to be taken.

The issue in *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295 (1976) concerned the question of the taking of a leasehold interest, the existence of which was not disputed. The Court held that a taking of such interest is compensable. In *Agins v. Tiburon*, 447 U.S. 255 (1980) the question related to the right of compensation where actions of the government result in inverse condemnation. There was not raised any question relating to ownership of the property seized. Analysis of the other cases cited yields the same result. The Court was considering the compensability of a taking, not the question of what interest was involved.

In this case, the Petitioners did not own the property claimed to have been taken. The Petitioners' oil and gas interests were made subject to the pooling application which resulted in the original pooling order. Notice of the hearing on that application was given to the Petitioners, and they were represented by counsel at the hearing. The Petitioners have never asserted a lack of notice of the origi-

nal hearing. The original pooling order provided the Petitioners with fifteen (15) days within which to elect as to their oil and gas interest.[18] The Petitioners elected not to take the risk of drilling the unit well, and accepted alternative compensation.[19]

The Petitioners claim that in electing not to share with Respondent the risk of drilling the unit well they relinquished rights only in the wellbore of that well. Accordingly, the argument continues with an assertion that working interest rights outside of that wellbore were retained. It is those rights purportedly retained which Petitioners argue were taken by the Oklahoma Supreme Court, and upon which this Petition centers. However, those rights were long ago relinquished to the Respondent and did not exist in Petitioners after the expiration of the election period provided in the original pooling order.

The Oklahoma Supreme Court, in the decision appealed from, stated as follows:

> "The Hearing Officer found Order No. 260474 force pooled the well-bore, not the unit. This clearly was erroneous. The order force pooled the entire unit, not just the well-bore. *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203, 206 (Okl.Ct.App. 1986) (adopted by the Supreme Court February 9, 1988). Order No. 260474 required Ward and Vierson (sic), Nova's predecessor in interest, to participate in the costs of drilling and completing the Wolfe #1-23 or accept a bonus in lieu of participation. Ward and Vierson (sic) elected to accept a bonus. *Once the election period passed, the property interest of the affected parties vested. Ranola Oil Co. v. Corporation Commis-*

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[18] See Ex. 32; R. 142, 117.

[19] See R. 51, 52, 65.

> *sion,* 752 P.2d 1116, 1119 (Okl. 1988). Once vested, the property rights of the parties were beyond the reach of the Commission's power to modify. Id.; *Crest Resources v. Corporation Commission,* 617 P.2d 215, 218 (Okl. 1980). *By accepting the bonus, Ward assigned its exploratory rights to Inexco,* the operator, and can assert no right to participate in the subsequent increased density well. Similarly, Nova, as Vierson's (sic) successor in interset (sic), can assert no right to participate in the subsequent increased density wells. *Ranola,* 752 P.2d at 1119. Once the bonus was paid, Inexco's property rights vested." Id. (Emphasis added.)

The Petitioners skirt the problem inherent in the Petition by stating that because the Petitioners thought that rights were being retained under the original pooling order, those rights were retained. The Petitioners argue that the original order was written as a well-bore order and only later changed by the Oklahoma Supreme Court into a unit order. Nothing could be further from the truth. The Oklahoma Supreme Court in the decision appealed from obviously found that the original order was always a unit order. The opinion quotes that part of the original order which specifically provides for pooling "as a unit. . ."[20]

In arguing to the Oklahoma Supreme Court, the Petitioners fully briefed their contentions that the original pooling order was intended as a well-bore order. Those arguments were rejected, and the Oklahoma Supreme Court has construed the order to be unit in scope based upon Oklahoma Law.

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[20] The orignal pooling order is replete with reference to Inexco's intent for the development of the entire unit, and closely follows the statutory language of title 52, Section 87.1(e). See Ex. 32; R. 142, 117.

The Oklahoma Supreme Court ruling, based upon construction of Oklahoma Statutory Law, is not subject to review in this Court. A decision of a state Supreme Court is binding upon this Court insofar as state law is concerned. *Williams v. Kaiser,* 323 U.S. 471 (1945). See also *Kingsley Intern. Pictures Corp. v. Regents of University of State of New York,* 360 U.S. 684 (1959).

PROPOSITION II.

THE WRIT SHOULD BE DENIED BECAUSE THE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO PROCEDURAL DUE PROCESS BY VIRTUE OF MISLEADING NOTICE.

As decided by the Oklahoma Supreme Court, the relinquishment of Petitioners' property rights took place upon expiration of the election period provided in the original pooling order. That order was issued after notice and a hearing upon the application of Inexco Oil Company. The Petitioners were given notice of that hearing and were represented by counsel at the hearing.[21] The Petitioners did not appeal the original order, and it became final. Inexco Oil Company was designated as operator of the drilling and spacing unit and the common sources of supply described in said order.

The record establishes that the Petitioners have never requested an amendment of the original order to remove Inexco as operator, or limit the scope of rights covered thereby. No party ever presented, or attempted to present, testimony which would support the requisite change in knowledge of condition upon which such amendment could be based. Without that evidence, the Oklahoma Corporation Commission was powerless to amend the order. *Marlin Oil Corpo-*

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[21] See Ex. 32; R. 142, 117.

ration v. Corporation Commission, 569 P.2d 961 (Okl. 1977). If the Petitioners felt there was effected a deprivation of rights by the original pooling order, it was incumbent upon the Petitioners to appeal that order and prevent it from becoming final. *Nilsen v. Ports of Call Oil Co.,* 711 P.2d 98, 102 (Okl. 1985).

The Petitioners cite a number of cases as authority in support of their procedural due process argument. A review of those cases, when applied to the facts presented in this matter, do not support granting the writ.

In *Lambert v. California,* 355 U.S. 225 (1957), the Appellant had no actual knowledge of a duty to comply with a legislative act. The well known ruling in *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950) provided that notice by publication is insufficient when actual notice can be accomplished using reasonable means. In *Peralta v. Heights Medical Center, Inc.,* 108 S.Ct. 896 (1988), the Appellant was improperly served and had no notice of a hearing on a guarantee of an employee's debt. In *Zauderer v. Office of Disciplinary Counsel of The Supreme Court of Ohio,* 471 U.S. 626 (1985), this Court upheld an order disciplining an attorney in spite of a claim that the theory relied upon for the censure was different than that originally noticed. The Court said it was enough if he was put on notice of charges and given an opportunity to appear and respond to same. Finally, in *Morgan v. United States,* 304 U.S. 1 (1934), the Court found that the notice of hearing before an administrative agency was too general and broad to apprise the parties what would occur at the hearing, and to allow preparation of a response.

The Petitioners herein were given notice of the hearing which led to the original pooling order. They do not contest such fact. The Petitioners were given an opportunity to appear for that hearing, and present their views. They did appear and present

their views. The Petitioners do not claim that the notice of hearing was too broad or general. Obviously, there is no lack of procedural due process. Nonetheless, the Petitioners pursue this appeal claiming the original pooling order, issued after notice and hearing, was the misleading instrument of notice.

The Petitioners do not argue that the original pooling order was ambiguous. They argue that it was clearly limited so as to be well-bore in scope. In their opinion, this is so because the Petitioners found the presence of the word "well" in the order. The Petitioners purportedly relied upon their personal construction of the language of the order as "notice" of the order's "intent," in making their decision not to participate. Thereafter, when the Oklahoma Supreme Court ruled the order to be unit in scope the Petitioners argue they were unconstitutionally misled, and cite *Butland v. Bowen*, 673 F.Supp. 638 (D. Mass. 1987) as precedent.

In *Butland*, supra, the District Court was reviewing a notice which denied a social security claim, but which *falsely* notified the claimant that she could file for reconsideration "at any time". In fact, she was required by written regulation to do so within four (4) years. The District Court found that the claimant reading such notice might wrongfully abandon a claim based upon its misleading content.

In this case, there can be no contention that the original pooling order contained a false representation of the effect of written statutes or regulations. As noted in *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203, 206 (Okl.Ct.App. 1986) (Adopted by the Supreme Court February 9, 1988), a complete reading of title 52, Section 87.1(e) shows that it has always required unit pooling. Therefore, the fact that the original pooling order was construed to be a unit order illustrates that it complied with the statute.

Any reliance upon a different personal interpretation was misplaced. The construction of the statute by the Oklahoma courts was clearly foreseeable.

The Petitioners attempt to establish the Statement of Policy No. 45 issued by the Oklahoma Corporation Commission[22] as misleading notice upon which they relied to their detriment. However, the Supreme Court of Oklahoma has approved condemnation of the action of the Corporation Commission in its implementation of that policy statement. In *Amoco Production Company v. Corporation Commission of the State of Oklahoma and Samedan Oil Corporation,* 752 P.2d 835, (Okl.Ct.App. 1987), the Court found that the policy was an arbitrary and erroneous interpretation of the pooling statute.

PROPOSITION III.

THE OKLAHOMA SUPREME COURT PROPERLY EXERCISED ITS SUPREME POWER IN INTERPRETING STATE LAW, AND ITS CONSTRUCTION OF THOSE LAWS WAS FORESEEABLE.

The Petitioners claim that the decision of the Oklahoma Supreme Court changed the original pooling order, and in so doing retroactively interfered with vested rights owned by the Petitioners. This is an ironic assertion, given the fact that the Oklahoma Supreme Court specifically found that the Oklahoma Corporation Commission was attempting to change the order from unit to wellbore and thereby divest respondents of vested rights. Over and above such irony, the claim is groundless.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), this Court ruled that state courts have supreme power to interpret written laws of the

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[22]Petition for Writ of Certiorari, A-12.

state. The power of the United States Supreme Court to review decisions of state courts was expressly limited to decisions on federal questions. It is not enough if the state court rendered an erroneous decision on a question of state law, *or overruled principles established by previous decisions on which the appellant may have relied.* Those facts alone will not confer appellate jurisdiction on the United State Supreme Court.

Although involving a criminal statute, the case of *Bouie v. Columbia,* 378 U.S. 347 (1964) has relevance to this cause. In that case, the Court found that the construction of a criminal statute by a state Supreme Court was "unforeseeable", and as such, when applied retroactively to subject a person to criminal liability for past actions, the effect was to deprive that person of due process of law. This deprivation resulted from the fact that the Court found that the statute gave the person "no warning" that it could be construed to include the offense for which he was convicted.

There can be no valid argument made that the oil and gas conservation statute of Oklahoma was not susceptible to the construction given it by the Oklahoma Supreme Court.[23] The wording of the statute clearly refers to the development of the drilling and spacing unit, and would put any party on notice, or warning, that it could be construed as being unit in scope.

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[23]In *Amoco Production Company v. Corporation Commission of Oklahoma,* 751 P.2d at 205, the Court expressly found that the provisions of title 52, Section 87.1(e) clearly and unambiguously authorized only unit pooling.

RELIEF REQUESTED AND CONCLUSION

In view of the foregoing, further review of this action is unwarranted. This Court has no jurisdiction to review the decision of the Oklahoma Supreme Court which construed a state statute. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 88-1447

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L. O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, and JAMES HASENBECK,
Petitioners,

v.

THE LOUISIANA LAND and EXPLORATION COMPANY as successor by merger and acquisition to INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (composed of JAMES B. TOWNSEND, BOB HOPKINS, and BOB ANTHONY), ROBERT H. HENRY as Attorney General for the State of Oklahoma, ROD W. YLITALO, MCFARLANE COMPANY, and TRIMBLE PROPERTIES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

PETITIONERS' REPLY BRIEF

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15 pp

QUESTIONS PRESENTED

I. Did the Oklahoma Supreme Court unlawfully take Petitioners' property, or deprive them of their property, contrary to the Fifth and Fourteenth Amendments of the United States Constitution, when that court rendered Petitioners' mineral leaseholds totally worthless by rewriting an earlier-issued final order, even though the order when issued recognized and validated Petitioners' leasehold interests and even though Petitioners relied on the clear intent and plain language of that order in making a multi-million-dollar investment decision?

II. Were Petitioners deprived of their right to procedural due process when the Oklahoma Supreme Court declared post-hoc that Petitioners' election not to participate under a "forced pooling order" extinguished Petitioners' mineral leasehold interests, even though the State had notified Petitioners before their election that the opt-out election would *not* extinguish Petitioners' leasehold rights?

RULE 28.1 STATEMENT

As required by Rule 28.1 of this Court, corporate Petitioners have listed their parent companies, subsidiaries, and affiliates at page *ii* of their Petition for a Writ of Certiorari to the Oklahoma Supreme Court.

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No. 88-1447

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L. O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, and JAMES HASENBECK,
Petitioners,

v.

THE LOUISIANA LAND and EXPLORATION COMPANY as successor by merger and acquisition to INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (composed of JAMES B. TOWNSEND, BOB HOPKINS, and BOB ANTHONY), ROBERT H. HENRY as Attorney General for the State of Oklahoma, ROD W. YLITALO, MCFARLANE COMPANY, and TRIMBLE PROPERTIES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

PETITIONERS' REPLY BRIEF

Petitioners submit this Reply Brief under S. Ct. R. 21.5 to address arguments first raised in the Respondent's opposing brief. This Reply Brief is necessary to correct the factual and legal errors of the Respondent, The Louisiana Land and Exploration Company as successor to Inexco Oil Company (the Respondent is sometimes referenced as "Inexco").

I. Respondent's state-law-only assertions miss the whole point of Petitioners' constitutional claims in this case.

For all its detail, Inexco's opposing brief makes two assertions. Inexco first asserts that Petitioners seek review of the state-law question whether forced pooling under Oklahoma's pooling statute should be done only once (on a unit basis) or once for each well drilled (on a well-bore basis). *Petitioners do not raise this question,* which was answered in 1988 by the Oklahoma Supreme Court's *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203 (Okla. 1988). Before this Court, Petitioners make a wholly different plea as the basis for why grave constitutional wrongs have been committed.

Pooling in Oklahoma has been done in two very different ways:

> Pre-*Amoco*. Before *Amoco,* the Oklahoma Corporation Commission interpreted the pooling statute to allow well-bore pooling. That is, an interested owner could elect out of the first well, and still maintain the right to participate in the second and later wells.
>
> Post-*Amoco*. After *Amoco,* the Oklahoma Corporation Commission could pool only on a unit basis. To participate in a second and later wells, an interested owner must thus elect to participate in the first well.

The First Order in this case was issued before *Amoco,* when the Commission pooled *exclusively* by the well bore. Unquestionably, the First Order had a well-bore scope.[1] Even so, Respondent Inexco focuses upon the post-*Amoco* interpretation of the pooling statute to suggest

[1] *See* certiorari petition at 14-18.

that because of such interpretation, the First Order must have been a unit order, and that only a question of state law exists. But the Oklahoma Supreme Court's interpretation of the statute, no matter how reasonable, could not change the meaning of the already final First Order. It is the wholesale after-the-fact rewriting of the First Order—not the interpretation of an Oklahoma statute—that forms the basis of Petitioners' constitutional claims here.

Left unsuccessful with the first assertion that this case involves only a matter of interpreting Oklahoma statutes, Respondent Inexco next asserts that the Oklahoma Supreme Court somehow conducted a state-law inquiry by searching for the intended pooling scope of the First Order and finding it to have "always" been unit-wide.[2] But to repeat: the Oklahoma Corporation Commission authored the First Order before *Amoco,* when the Commission's avowed policy was to pool exclusively by the well-bore. So the First Order was intended, meant, and understood as having only well-bore scope. Nowhere has the Oklahoma Supreme Court or Respondent Inexco ever squarely addressed the intent, meaning, or understanding of the First Order. Instead, both the Oklahoma Supreme Court and Inexco's opposing brief say only that the scope of the First Order had to be unit-wide because it could not as a matter of law be anything else. The rub is that the unit-only rule did not come until 1988, years after Petitioners had surrendered what they were misleadingly told would be their property interests in only a single well (what became the piddling Wolfe Well). Not until after this misleading pre-1988 notice did Petitioners learn that they had been summarily ousted of their property interests in all later wells (like the prolific Albright Well).

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[2] *See* Respondent's opposing brief at 15-16.

This sting suffered by Petitioners goes largely unaddressed by both the Oklahoma Supreme Court and Inexco. Given the undeniable well-bore scope of the First Order as written and reaffirmed by the authoring Commission, the constitutional problem presented here becomes apparent. A simple hypothetical, on all fours with this case, drives Petitioners' point home:

Assume that a landowner owns two buildings on adjacent land parcels also owned by landowner. Call the parcels "left" and "right," and assume each is worth $1 million. Next, assume that the city needs property in this neighborhood, so it brings a condemnation action. The city relies on a state condemnation statute which happens to prohibit condemnation of partial tracts. Even so, the trial judge after a hearing enters an order condemning the "left" parcel, transferring it to the city, and compelling the city to pay the landowner $1 million. The landowner is satisfied with the price, so he does not appeal. Neither does the city. A year later, the city calls the sheriff, forcibly removes the landowner from the "right" parcel, and takes possession of it.

The landowner brings an injunctive action before exactly the same judge who heard the original condemnation action. The trial judge writes an opinion that says, "When I issued the condemnation order, I said that the left parcel was condemned, but not the right parcel. Therefore, I hold that the city cannot now take the right parcel."

The city appeals. While the appeal is pending, the state supreme court in an entirely separate case construes the state condemnation statute to say that a trial judge can never enter a condemnation order that splits adjacent tracts. Thereafter, the injunction case on landowner's left and right parcels comes before the state supreme court. This court then issues a decision saying that when the trial

judge entered the first condemnation order, he clearly ordered condemnation of both the left and the right parcels.

As a matter of constitutional law, this is exactly what has occurred here. Unquestionably, it raises fundamental constitutional questions of fair notice and just compensation. To say as Inexco does that such a case raises only state-law questions because the state supreme court merely interpreted an earlier state court order is preposterous. Just as in the above hypothetical, the rewriting of the First Order here in the teeth of its undeniable meaning when issued obviously presents a grave constitutional problem which this Court should correct via certiorari review.[3]

II. Petitioners have established an unconstitutional taking of their property interests after they received a misleading notice when they cast their opt-out elections.

What Inexco's opposing brief completely fails to address is the crux of the constitutional violation that occurred in this case. Under the pre-*Amoco* rule, the First

[3] The constitutional violation in this case is even more egregious than the violations condemned by this Court in *Bouie v. Columbia*, 378 U.S. 347 (1964). Cast in *Bouie* terms, this case is equivalent to allowing a defendant to plead guilty of a lesser included offense, sentencing him to a prison term, and then, over four years later, when the state supreme court decides that the statute allowed conviction only for the greater offense, simply extending the defendant's sentence a few years and assuming conviction for the greater offense. Or, on even closer facts, this case is equivalent to the state's condemning a 25 foot width of property for a road, and then, when the state supreme court decides that the applicable statute requires condemnation of a minimum of 35 feet, automatically expanding the width from 25 feet to 35 feet, without new notice, without new hearing, and without additional compensation. *See Barfnecht v. Town Board of Hollywood Township*, 232 N.W.2d 420, 423 (Minn. 1975).

Order was entered as a well-bore order and became final without appeal. Petitioners elected out under the First Order after being told by the State that they would have an option to participate in the second well. When it came time to participate in the second well, the State "changed its mind," decided that the First Order should not have given Petitioners that option, and completely foreclosed Petitioners from any further participation in the unit. Petitioners were paid only for selling their interests in the first well, and not any subsequent wells; Petitioners were given notice that their election would concern only the first well, and not any additional wells; and Petitioners received a vested property right in the final judgment of the First Order that was subsequently disturbed by a collateral attack.

These are not issues of state law. These issues do not concern what is the proper interpretation of the Oklahoma pooling statute. Nor can the 1988 decision in *Amoco* permit a rewriting of the already final and never-appealed First Order which was intended, meant, and understood to have a limited scope not barred until 1988. Instead, the facts of this case raise serious constitutional questions whether Petitioners' property interests in additional wells within the unit were taken without just compensation, whether Petitioners were deprived through a "condemnation-type" proceeding of their full interests in the unit without due process because they received misleading notice, and whether Petitioners' vested property rights in a final judgment were improperly destroyed by an unwarranted collateral attack on that final judgment.

Petitioners recognize that Oklahoma law now provides for unit pooling. But Respondent Inexco never really addresses whether an admittedly incorrect interpretation of state law may nevertheless create constitutionally pro-

tected interests in those who rely upon such incorrect interpretation. True, this Court does not decide questions of state law, but a state court cannot contravene constitutional limitations and evade this Court's review by casting its decision as a question of state law. *See, e.g., Fiske v. Kansas,* 274 U.S. 380, 385-86 (1927); *Enterprise Irrigation Dist. v. Canal Co., 243 U.S. 157, 164 (1917).*

III. Petitioners have presented no "inaccuracies" or "misleading statements."

What Inexco's opposing brief calls "inaccuracies" and "misleading statements"[4] are either omitted unnecessary details or stem from Inexco's stubborn refusal to recognize pre-*Amoco* law. The challenge to Petitioners' ethics[5] is a challenge to facts presented to the Oklahoma Supreme Court, which bear out Petitioners' geological theories presented to the Oklahoma Corporation Commission as far back as the proceedings resulting in the First Order in this case.[6]

Respondent challenges Petitioners' statement that a unit is developed one well at a time. This statement is absolutely true, both before *Amoco* and after *Amoco*. If the first drilled well cannot drain the unit, an additional well will be drilled. This fact becomes most important when the interested parties disagree about the optimal location of the well. Under the pre-*Amoco* well-bore regime, only the

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[4] *See* Respondent's opposing brief at 2, 6.

[5] *See id.* at 10.

[6] Respondent's challenge of Petitioners' ethics for including "unsubstantiated figures" has no merit. All of the figures stated by Petitioners are in the record. *See* R. 86-87 (figures for Wolfe well); verified statement filed July 26, 1988, apprising Oklahoma Supreme Court of post-appeal developments under Oklahoma Supreme Court Rule 7, p. 1-42 (figures for Wolfe and Albright Farms Well).

first well in the unit was pooled by the initial pooling order. It was contemplated that if additional wells were drilled, every interested party would again have an option to participate. Thus, if an interested party believed the first well was located in the wrong place, he was legally free to elect out of that well and to participate in the additional well drilled later to effectively drain the unit.

Only after Amoco was this legal result changed. After *Amoco,* since well-bore pooling is no longer an option, the owner must participate in the first *marginal* well in order to participate in a second *efficient* well that will drain the unit.

Before *Amoco,* developing one well at a time had key importance where the interested parties disagreed over the optimal location. If the non-participating owners were correct in supporting an alternative location, then they were free to participate in the additional well that would have to be drilled to drain the unit.

That is exactly what occurred in this case. Under the well-bore regime before *Amoco,* Petitioners disagreed with Respondent Inexco over the optimal location of the first well. Petitioners opted out of the first well and elected to participate in the additional well. The additional well was the optimal well. Because the operator chooses where to locate a well, there is no need to mention location in the pooling application. But in choosing the operator, the Commission relies upon the operator's geological statistics and proposals. Thus, when Petitioners supported the appointment of Petitioner Ward Petroleum Corporation as operator of the first well, they clearly voiced their support of the alternative (optimal) location of the well in the Section 23 unit.[7]

[7] Inexco had completed an offset well in Section 25, the southeast diagonal offset to Section 23, as a dry hole. Thus, Petitioner Ward

Respondent Inexco accuses Petitioners of misleading the Court by equating seeking an additional well with seeking a second forced pooling order. This attack is but another example of Respondent's failure to recognize the pre-*Amoco* pooling regime. Before *Amoco,* every additional well was subject to an additional forced pooling order. Only with the decision in *Amoco* did a party initially electing out lose the right to have his interests in additional wells pooled on a separate basis when the additional wells were drilled. Also, when a second well is drilled, it is necessary to provide an opt-out election to those originally electing to stay in the unit.

Well-bore pooling existed in Oklahoma before *Amoco.* The First Order in this case was decided under a well-bore policy. The facts of this case must be considered against that pre-existing law. The facts cannot be artificially presented by imposing a subsequent legal fiction of unit pooling on a pre-*Amoco* setting.

IV. Petitioners have established an unconstitutional attack on the vested property interests of a final judgment.

Citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), Respondent argues this Court has no jurisdiction over mere questions of erroneous interpretations of state law. That is what *Brinkerhoff-Faris* says. But *Brinkerhoff-Faris* also says that permitting a retroactive application of a new interpretation of state law deprived petitioner of its property without an opportunity to be heard. *Id.* at 679. That is what has happened in this case.

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[7] (Cont'd) determined that the optimal drilling location was the North Half of Section 23. R. 56-57. Petitioners elected not to participate in Inexco's well because of concerns over its location. R. 51-52, 167-68.

Even if the Oklahoma Corporation Commission misinterpreted the Oklahoma pooling statute, that interpretation was "an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed." *Linkletter v. Walker,* 381 U.S. 618, 624 (1965) (describing Austinian approach); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374 (1939).

The Oklahoma Corporation Commission adopted a policy of well-bore pooling. The First Order was decided under that policy. *Amoco* later declared that the well-bore pooling policy was not valid. However, the existence of the final First Order is a juridical fact that cannot be ignored. Petitioners received vested property interests in that final judgment, relied on that judgment, and cannot be divested of those interests without now being accorded new elections to participate in the unit.

In sum, this Court should grant the relief requested by Petitioners on pages 27-28 of their certiorari petition.

Respectfully submitted,

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No. 88-1447

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, ET AL.,
Petitioners,

v.

THE LOUISIANA LAND AND EXPLORATION COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF SUPPORTING PETITIONERS
AND
***AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS AND THE GARFIELD COUNTY MINERAL OWNERS ASSOCIATION**

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF SUPPORTING PETITIONERS

Amici Curiae, the National Association of Royalty Owners and the Garfield County Mineral Owners Association, are independent associations of mineral, surface, and royalty owners. This Motion is filed because consent to *amicus* status was refused by Respondent The Louisiana Land and Exploration Company.

Amicus Curiae party the National Association of Royalty Owners (NARO) represents mineral, surface, and royalty owners located in all fifty states. In Oklahoma, NARO is affiliated with 27 different county royalty associations. NARO represents nearly 5000 individual members and 38,500 affiliates. NARO is the only national

organization in the United States devoted totally to the royalty (producing sub-surface interests) and mineral owner (non-producing sub-surface interests).

Amicus Curiae party the Garfield County Mineral Owners Association represents the interest of a group of surface, mineral, and royalty owners located primarily in Garfield County, Oklahoma.

The specific issue before the Court in this case involves many parties and many different mineral interests. Petitioners have demonstrated for the Court the significance of these interests, and the number of persons affected by the immediate decision of the Oklahoma Supreme Court. However, the facts not presented by the petition for certiorari in this case involve the number of mineral and royalty owners affected by the precedent established by the Oklahoma Supreme Court. The error in this case is not only capable of repetition, but is bound to be repeated unless corrected by this Court.

As the brief filed by *amici curiae* associations will demonstrate, a great number of Oklahoma mineral and royalty owners have a stake in the outcome of this case. Those individual owners are the holders of certain vested property rights in well-bore scope pooling orders that were unappealed and final before the Oklahoma Supreme Court decided in *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203 (Okla. 1988), that the Oklahoma Corporation Commission had no power to pool by the well bore. In spite of the *Amoco* decision, the rights which had vested under pre-existing final orders of the Oklahoma Corporation Commission must not be dis-

turbed by subsequent, collateral action by the Oklahoma Supreme Court.

Because a decision by the Court in this case will affect more than the actual parties to this case, and will serve to protect the rights of numerous other similarly situated mineral and royalty interest owners, the Court should grant leave to *amici curiae* associations to file an *Amicus Curiae* Brief to demonstrate these wide ranges of interest.

Respectfully submitted,

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Respondents.

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS AND THE GARFIELD COUNTY MINERAL OWNERS ASSOCIATION

QUESTIONS PRESENTED

(same as in certiorari petition)

I. Did the Oklahoma Supreme Court unlawfully take Petitioners' property, or deprive them of their property, contrary to the Fifth and Fourteenth Amendments of the United States Constitition, when that court rendered Petitioners' mineral leaseholds totally worthless by rewriting an earlier-issued final order, even though the order when issued recognized and validated Petitioners' leasehold interests and even though Petitioners relied on the clear intent and plain language of that order in making a multi-million-dollar investment decision?

II. Were Petitioners deprived of their right to procedural due process when the Oklahoma Supreme Court declared post-hoc that Petitioners' election not to participate under a "forced pooling order" extinguished Petitioners' mineral leasehold interests, even though the State had notified Petitioners before their election that the opt-out election would *not* extinguish Petitioners' leasehold rights?

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS AND THE GARFIELD COUNTY MINERAL OWNERS ASSOCIATION

INTEREST OF *AMICI CURIAE*

Amici curiae, the National Association of Royalty Owners (NARO) and the Garfield County Mineral Owners Association represent the interest of many mineral, surface, and royalty owners in Oklahoma. A more lengthy discussion of the interest of *amici curiae* is contained *supra* in the Motion for Leave to File *Amici Curiae* Brief, bound under this same cover. The statement of the interest of the *amici curiae* in the Motion is incorporated in this brief for purposes of S. Ct. R. 36.5.

SUMMARY OF ARGUMENT

Amici curiae mineral and royalty owners associations support Petitioners' request for certiorari. This Court should grant certiorari for two simple reasons. First, the Oklahoma Supreme Court stepped over constitutional boundaries by disregarding vested property interests in a final judgment. Once a judgment becomes final, even if it is based on an incorrect interpretation of the law, the parties receive constitutionally protected interests in that judgment. Second, the importance of this issue is not limited to the (admittedly numerous) Petitioners in this case. Instead, there is a great potential for repetition of the exact constitutional violation which has occurred in this case. To prevent the unnecessary repetition of the Oklahoma Supreme Court's error, this Court should grant certiorari and affirm the constitutional sanctity of a final judgment.

ARGUMENT AND AUTHORITY

Amici curiae have, in the past, urged the Oklahoma Corporation Commission to maintain a pooling policy whereby the Commission retains the discretion to either pool by the well bore or by the unit. *Amici curiae* believe that this is the wisest policy because of the varied geological and reservoir characteristics found within the State of Oklahoma. No two drilling and spacing units are geologically identical. Some wells are drilled for crude oil; others are drilled for natural gas. Some wells produce both gas and oil. Some geological prospects are heavily faulted, and have separate reservoirs; others are not. Some hydrocarbons occur at relatively shallow depths; others do not.

Some reservoirs have high porosity and permeability; others do not.

The facts and circumstances surrounding the creation of the unit, and the factors affecting the decision whether to participate in the unit, vary widely according to the geological and reservoir characteristics of the proposed unit.

The position urged by *amici curiae* was effectively rejected by the Oklahoma Supreme Court in *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203 (Okla. 1988), where the court determined that pooling could only be done by the unit. The court did, however, announce that that rule would apply prospectively only, and would not affect any well-bore order that was final prior to the court's decision. *Id.* at 208.

In this case, the Oklahoma Supreme Court has ignored its own ruling that *Amoco* is to be accorded prospective effect only. The first order in this case was unquestionably of well-bore scope. This order was never appealed, and became final, prior to the *Amoco* decision. When a second additional well was drilled in the unit involved in this case, an additional pooling order was sought (because the first pooling order covered only one well). The Oklahoma Corporation Commission ruled that the second order should be well bore in scope, just like the first pooling order covering the unit. The second order *was* appealed, and the supreme court considered it *after* having decided *Amoco*. Because it was on direct appeal, the second order was properly subject to the *Amoco* rule. It is im-

portant that Petitioners have never disputed the fact that the second order is subject to *Amoco*. Instead, Petitioners have sought to protect their vested rights obtained under the first order, which was final, which was well bore in scope, which was not appealed, and which was not subject to the *Amoco* rule.

The facts of this case are not at all unique. Many well-bore scope orders became final prior to *Amoco*. From May 3, 1984, until January 1987, the announced policy of the Oklahoma Corporation Commission was to pool *exclusively by the well bore.* Prior to that, the Commission pooled both by the well bore and by the unit. The Commission has been faced with a large volume of controversies concerning interpretations of these pre-*Amoco* pooling orders. Because of previous Commission policy, many of those orders have been construed by the Commission to be well-bore scope. *See, e.g.,* Application of Helmrich and Payne, Inc., C.D. 141993, Order 328779 (Aug. 1, 1988) (recognizing that rights vested by elections under pre-*Amoco* well-bore orders should not be disturbed); Application of Wagner & Brown, C.D. 143485, Initial Report of Hearing Officer (Jan. 6, 1989) (same). If these actions, or if any of the numerous other similar actions pending before the Commission are appealed to the Oklahoma Supreme Court, the potential exists for the mistake committed by the Oklahoma Supreme Court in this case to be repeated.

Amici curiae, despite the decision of the Oklahoma Supreme Court, are nonetheless firmly convinced the Oklahoma pooling statute should allow pooling both by

the well bore and by the unit, depending on the circumstances.[1] However, regardless of how the Oklahoma Supreme Court decided *Amoco*, an even more important concept is at stake in this case. That concept is when a judgment is final, and when the judgment has been entered according to certain standards, the judgment should not be summarily vacated and reversed by a subsequent collateral attack. This Court itself has recognized as a general principle of law that stare decisis should be closely followed when dealing with property rights.

> For that doctrine [stare decisis] not only plays an important role in orderly adjudication; it also serves the broader societal interest in even-handed, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272

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[1] In fact, *amici curiae* view the *Amoco* decision as giving an unconstitutional construction to the pooling statute. If the pooling statute is construed as to mandate unit-wide pooling and never allow well-bore pooling, the statute becomes a legislative act so irrational as to violate due process. The justification for forced pooling is the prevention of waste and the protection of correlative rights. However, these two goals cannot be achieved without giving careful consideration to the specific geological facts involved in any particular drilling unit. In some instances, pooling by the well bore may be justified. In other instances, pooling the entire unit may be justified. The only reasonable and necessary interpretation of the pooling statute is allowing discretion to do either.

(1980) (Stevens, J., joined by Brennan, Stewart, and Blackmun, J.J.).

This case involves far more than the doctrine of stare decisis. This case involves far more than a mere refusal by a state court to adhere to its announced decisions. This case involves an even more fundamental concept. A final judgment is a property interest that cannot be disturbed without due process and cannot be taken without just compensation. Under Oklahoma law, a final judgment is a vested right. *See Timmons v. Royal Globe Ins. Co.*, 713 P.2d 589, 594 (Okla. 1985) ("No term of a judgment may be affected by after-enacted legislation. To hold otherwise would undermine the constitutionally-shielded concept of an 'accrued' or 'vested' right in the adjudicated obligation.") This Court has frequently cautioned that when legislation or a judicial decree is given retroactive application, an implicit limitation is that vested or accrued rights must be respected. *See, e.g., Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Linkletter v. Walker,* 381 U.S. 618, 627 (1965) (the effect of the subsequent ruling of invalidity of a statute on a prior final judgment [rendered under the statute] when that prior judgment is collaterally attacked depends upon a consideration of rights claimed to have become vested); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).

As Oklahoma law now stands, the Corporation Commission incorrectly interpreted the Oklahoma pooling statute by allowing pooling by the well bore. However, before the Oklahoma Supreme Court so ruled, the Cor-

poration Commission entered hundreds, perhaps thousands, of well-bore pooling orders. Many of these orders were unappealed and became final before the *Amoco* decision—a decision prospective in scope only. When those pooling orders became final, the parties received property interests in the final judgments represented by the well-bore scope pooling orders. To allow the Oklahoma Supreme Court to collaterally attack those final judgments, as was done in this case, is to deprive parties of their property interests without due process, and without just compensation.

This Court has never tolerated retrospective adjustment of liabilities established by a final judgment.

> And in either case, where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it. Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of the parties which have been established by a solemn judgment.

Massingill v. Downs, 48 U.S. (7 How.) 760, 768 (1849). If the first order needed any interpretation by the Oklahoma Supreme Court, it was supplied by the announced prospective application of *Amoco*. This final order can not now be singled out and treated differently from all the other pre-*Amoco* well-bore pooling orders.

Due process requires that once a judgment is final, it not be disturbed. It matters not whether it is the legislature or the judiciary that attempts to disturb that vested right.

This Court should take this opportunity to grant certiorari in this case, and confirm this vital principle. Such a holding transcends the narrow confines of this case, and will aid the thousands of parties in Oklahoma affected by final well-bore scope pooling orders.

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